(18782.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 554.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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STATEMENT OF CASE.

The salient facts in this controversy, disclosed by the bill of complaint, may be thus summarized:

The People's National Bank of Denver, Colorado (organized under the national banking act, with an *original* authorized capitalization of three hundred thousand dollars), being fully authorized and empowered to exercise any and all corporate powers pertaining to national banks, desiring to provide itself with a banking house in which to transact its corporate business and affairs, entered into a contract, on the 12th day of September, A. D. 1889, with appellee, George C. Schleier, whereby the latter demised to the Bank, "*its successors and assigns*," by written lease, under seal, bearing said date, certain real estate situate in the city of Denver, for the term of ninety-nine (99) years, from February 1, A. D. 1890, for the annual rental of thirteen thousand nine hundred and seventy-five ($13,975.00) dollars, payable in proportionate monthly installments, the first thereof being due and payable on the 15th day of February, A. D. 1890. The lessee (its successors and assigns) was given the option to extend the demised term for a period of fifty (50) years, after the expiration of the ninety-nine (99) years, upon the same *rental* stipulated to be paid for the original term.

The lease contained a covenant on the part of the lessee Bank, that within eighteen months from February 1, A. D. 1890, it would build and complete, at its own cost and expense, upon the demised premises:

> "A good, substantial building, not less than four stories in height, to cost not less than one hundred thousand ($100,000.00) dollars."

Coupled with the provision:

> "Said building and improvements erected or made upon said premises shall at once become a part of ..... the real estate hereinbefore demised, without any right on the part of anyone whomsoever to remove the same or any part thereof, except for the purpose of remodeling, rebuilding, or improving the same."

The lessor covenanted to remove, at his cost and expense, from the demised premises, certain existing store rooms, then situate thereon.

The lease contained a further covenant, on the part of the lessee, to insure the improvements on the demised premises against loss or damage by fire; taxes and assessments upon the property, during the demised term, to be also borne by the lessee, its successors and assigns.

Prior to and at the time of the execution and delivery of the lease, the lessor was seized of a fee simple, unencumbered title to the whole and every part of the demised premises, and such lease, after due execution, both by the lessee and lessor, and delivery thereof, was filed for record during the month it was executed, and duly recorded, September 21, 1889, pursuant to the statutes of the state of Colorado, in the office of the clerk and recorder of Arapahoe county, in said state, wherein the city of Denver is located.

The lessor duly complied with and fully executed all of his obligations, assumed or created by the lease, by delivering possession of the demised premises to the lessee, and by the removal from the demised premises, at his own expense, of all of the existing buildings and structures thereon. The lessee thereupon took possession of the demised premises, and, pursuant to the covenant in that behalf contained in the

lease, proceeded to construct a good, substantial building upon the property; but, instead of contenting itself with erecting a structure of the size and cost called for by the lease, it voluntarily built an eight-story building, sub-divided into two large banking rooms, with burglar-proof vaults, on the main floor, a number of store rooms on the ground floor; the remainder of the building was divided into eighty-four rooms, suitable for use as offices; the total cost of the structure, when completed, being about three hundred and five thousand ($305,000) dollars.

Such increase in the dimensions of the building, as well as the cost thereof, in excess of the stipulations in the lease, were all had and done by the Bank, as lessee, without any request on the part of the lessor, and without any mutual understanding or agreement in the premises, the Bank exercising its legal right and privilege, as lessee, to construct upon the leased premises a building of such dimensions and design as it conceived to be suitable and proper for its uses as a banking house, without limiting itself to the size and cost stipulated in the lease.

The lessor did not protest or object to the construction of a larger and more costly building than that called for by the lease, and his mere inaction in this respect is all that is charged against him in that behalf.

The bank building was completed and fully paid for by the Bank by January, A. D. 1891, and promptly thereafter it moved into such building, and used and occupied one-half of the first or main floor for the transaction of its legitimate banking business, and permitted another bank, known as the People's Savings Bank, organized under the laws of the state of Colorado, to use a portion of the same floor for the carrying on of its banking business. The remainder of the building, not actually used for banking purposes, was rented

by the lessee National Bank for office and store purposes; it deriving an income from the office and store rooms so let.

The lessee National Bank continued to do business in the ordinary course, as a banking association, until the 19th day of July, *A. D. 1893*, on which date, being upable to pay its depositors in due course of business, the comptroller of the currency appointed a receiver for the Bank, who remained in possession of its assets and affairs for about *one month*, when, upon the agreement of the Bank to make a voluntary assessment upon its shareholders of twenty per cent. to restore the impairment of its share capital, the receiver was discharged and the Bank thereupon resumed business in said bank building, and continued to carry on a banking business until the 20th day of December, *A. D. 1899*, when the comptroller of the currency, becoming satisfied that the lessee National Bank was insolvent, appointed a receiver for it and its assets, to wind up its business and affairs, pursuant to the provisions of the national banking act in that behalf.

More than two years prior to the appointment of the last mentioned receiver, to wit, in the year 1897, the lessee Bank was in default in the payment of rent to the lessor, Schleier, for the demised premises, for the months of August, September and October of that year, and was then also in default in the payment of certain taxes and assessments upon the demised premises, theretofore due and payable; such defaulted rents, taxes and assessments amounting in round numbers to the sum of six thousand ($6,000.00) dollars. Under these conditions a meeting of the stockholders of the lessee Bank was duly called and held, to consider the proposition of surrendering the remainder of the leasehold term, including the bank building, to lessor Schleier, the directors of the Bank being of the opinion that the income from the bank building would not thereafter suffice to meet the fixed charges thereon; and such stockholders' meeting was

duly held, on the 30th day of October, A. D. 1897; at which time, in consideration of the lessor releasing and discharging the Bank from its liability to pay the rents, taxes and assessments, then so in arrears, and to discharge and release the Bank from all further installments of rent thereafter to accrue under the lease, the stockholders authorized the surrender of the remainder of the leasehold term, together with the possession of the bank building, to the lessor, and due, written releases were mutually executed, exchanged, delivered between the Bank and the lessor in the premises, and duly recorded in the records of said Arapahoe county.

The surrender of the lease and bank building to the lessor was had and done in connection with proceedings instituted by the lessee Bank, looking toward a voluntary liquidation and winding up of its affairs, such liquidation, however, not being consummated prior to the appointment of the receiver, of date December 20, A. D. 1899.

The People's Savings Bank, heretofore referred to, becoming financially embarrassed, made an assignment of its assets to one F. J. Spencer, as assignee, who thereafter, in June, 1897, brought an action, in behalf of the Savings Bank, against the lessee National Bank, and on November 30, 1899, recovered a judgment against it, in such action, for the sum of four hundred and seventy-five thousand eight hundred twenty-five and seventy-one one hundredths ($475,825.71) dollars, and the present suit by the receiver of the lessee National Bank is prosecuted by him for the sole use and benefit of the said assignee of the People's Savings Bank, as such judgment creditor of the lessee National Bank; the prayer of the bill, in effect, being:

> a. That the said lease from appellee Schleier to the appellant National Bank, together with the subsequent surrender of such lease and the bank

building, should be respectively adjudged null and void, as *ultra vires* acts and transactions on the part of the appellee National Bank.

b. That an accounting should be had against appellee Schleier for the moneys of the bank expended in the construction of the bank buiding, and that the amount of such moneys should be declared a first and prior lien and charge upon the bank building, and also upon the demised real estate upon which it was constructed, and that said land and building should be jointly sold for the payment of the decree, upon such accounting.

Ignoring mere statements of legal conclusions contained in the bill, the foregoing contains a complete synopsis of all material facts averred in that pleading:

A demurrer to the bill was interposed by the defendants, appellees. The demurrer was sustained and final decree entered, dismissing the bill, which decree was affirmed, on appeal, by the Circuit Court of Appeals, and the case is now in this court on appeal from such judgment of affirmance.

Leave to file an amended bill of complaint was denied in the Circuit Court. Such amended bill, however, was not tendered, or leave to file the same asked, until more than thirty days had elapsed subsequent to the rendition and entry of the final decree dismissing the original bill. The correctness of the action of the Circuit Court in refusing to allow the amended bill to be filed, is here challenged by appellant, and we will hereafter address ourselves to the question of whether such refusal is subject to review on this appeal, or furnishes adequate cause for reversal.

Before entering upon a discussion of the legal propositions involved in the pending appeal, we desire to direct the attention of the court to the following matters, which, un-

der the principles of equity pleading and legal presumptions proper to be indulged in, are impliedly admitted, by reason of the failure of the appellant to aver the existence of a contrary state of facts in his bill, viz.:

a. That appellee National Bank was *solvent* when the lease was made, and so continued until the bank building was fully completed and paid for, and for a period of more than two years and a half thereafter.

b. That no part of the moneys of the Savings Bank (being the sole creditor represented by the appellant receiver) was used for or in the construction of the bank building.

c. That such Savings Bank was not a creditor of the appellee National Bank at the time of the making of the lease and construction of and payment for the bank building, and did not become such creditor until long *subsequent* to the consummation of each and all of said transactions.

d. That every creditor of the National Bank, whose claim existed or had its initiation prior to the execution of the lease, or prior to the completion of the bank building and the payment of the cost of construction thereof, has been paid in full.

e. That each and every stockholder of the National Bank authorized and consented to the entering into and execution of said lease and each and every of its terms and provisions; and also consented to and authorized the construction of the bank building and payment of the cost thereof.

f. That the construction of the bank building did not render or cause the National Bank to be-

come insolvent, or in anywise impair its *then* capital.

g. That prior to the execution of the lease, or, at least, prior to the completion of the bank building, the National Bank had duly increased its capital stock, pursuant to the provisions of the national banking act in that behalf, to such extent that each and all of the obligations or covenants assumed by the Bank under the lease could have been fully complied with, without contravening either the letter or spirit of the national banking act, touching the limit of indebtedness which might be lawfully incurred by it.

h. That neither the execution of the lease and the construction of the bank building nor the surrender of the lease was tainted with any fraud or unconscionable conduct on the part of either lessor or lessee.

i. That, as a business proposition, the lease appeared to be an advantageous one for the Bank to enter into and assume the obligations imposed thereby, in the light of surrounding circumstances and prospects then existing and reasonable to be anticipated.

j. That the value of the demised term, at the time of the execution and delivery of the lease, was an adequate compensation for the payment of the stipulated rent and the money required to be expended in the improvement of the property, as real estate values then existed in the city of Denver and were then reasonably expected to continue.

k. That the government of the United States, through the comptroller of the currency, at whose

instance this suit is brought, knew of the existence of the lease practically contemporaneous with its execution, and the moneys which were being expended in improving the demised premises, and approved the same.

l. That appellee, Schleier, as lessor, did not know, at the time of the execution of the lease, that the building required to be constructed upon the demised premises would ever be used by the lessee in any manner or for any purpose contrary to law; and further, was not then aware of the fact that a building of the character and dimensions called for by the lease would not, in fact, be necessary or required for the legitimate transactions of its banking business by the lessee National Bank.

m. That said lessor was justified in presuming, at the time of the execution and delivery of said lease, that the amount of the *then* capital of the lessee Bank was sufficient and adequate to meet and satisfy all of the obligations and indebtedness assumed by the lessee Bank under the lease, without contravening any of the provisions of the national banking act, with reference to the incurring of indebtedness by said Bank.

n. That the said People's Savings Bank, *real plaintiff herein*, at the time it began to extend credit to the National Bank, had full knowledge of the existence of the lease and of the construction and cost of the bank building.

o. That the Savings Bank had full notice of the intention of the National Bank to surrender the lease and the bank building, and acquiesced in said surrender.

p. That the true and actual value of the demised premises, on the date the lease was executed and delivered, was then equal to, if not in excess of, the *market or cash value* of the said premises with the bank building thereon, on the date (over eight years thereafter) when said lease, by mutual agreement of said lessor and lessee, was surrendered and possession of the land and building delivered to the lessor.

q. That the leasehold interest surrendered by the lessee to the lessor, including the bank building upon the demised premises, was not possessed of any marketable or assignable value whatsoever on the date of such surrender, charged, as such leasehold interest was, with the obligations on the part of the lessee, or its assigns, to pay rent and other fixed charges in arrears, and the continuing obligation to pay future rent, taxes and other fixed charges, as the same should thereafter accrue.

r. That the depreciation in value of the demised term, between the date of the execution of the lease and the construction of the bank building, and the date when such lease and bank building were surrendered to the lessor, was owing to causes and conditions over which neither the lessor nor the lessee had any control, or could have originally foreseen, namely: decline in real estate values, arising from divers general or local causes.

s. That the temporary financial embarrassment of the lessee Bank, which occurred in the summer of *1893*, resulting in a receivership lasting about *one month*, was not occasioned by any of the transactions complained of, but was proximately attrib-

utable to the widespread, disastrous panic of that year, when failure and receiverships of banking institutions throughout the country was the rule, and escape therefrom the exception.

It is manifest, from the foregoing, that the supposed equities upon which this suit are based are wholly and solely founded upon the theory that the making and entering into of the lease in question was, *ab initio*, an *ultra vires act* upon the part of the lessee Bank, and the moneys expended by it in the construction of the bank building, therefore, recoverable in this suit, and the land itself upon which the building was constructed may be charged with a lien and sold for the re-payment of the moneys so expended, it being contended that an equitable right to such relief results as a necessary sequence from the alleged original invalidity of the lease.

That this is a correct concept of the bill of complaint is borne out by the fact that the prayer for relief does not ask for a restoration to complainant of the leasehold interest, charged with its obligations, coupled with the further circumstance that the bill does not allege any state of facts from which a violation of the national banking act would appear, with reference to unlawful preferences by an insolvent national bank of one creditor over another in the matter of the surrender of the lease and building.

LAW OF THE CASE.

The theory upon which appellant seeks to recover, and upon which a reversal of the final decrees of the Circuit Court and the Circuit Court of Appeals is based, may be thus stated:

First. That the making and entering into of the lease in controversy was an *ultra vires* act upon the part of the National Bank, because:

a. A national bank is not authorized to take a lease of real estate running for a longer period than its corporate existence, even though the purpose of the lease is to enable the bank to construct and maintain a suitable bank building upon the demised premises for the transaction of its banking business.

b. The aggregate amount of rent for the full demised term constituted an indebtedness, exceeding the amount of the capital stock of the lessee Bank, as such capital was *originally* fixed in its organization certificate.

c. A national bank, in taking a lease of real estate upon which to construct a bank building for the transaction of its ordinary business, is not authorized to enter into a covenant requiring it to construct a building of any specified cost or dimensions, such building, when constructed, to become a part of the realty upon which it stands.

d. Inasmuch as the lessee National Bank voluntarily constructed a bank building upon the demised premises larger than was necessary for its immediate accommodation in the transaction of its banking business, and sub-let, for profit, the portion of the building not then required by it for banking facilities, and, further, as the moneys expended by the Bank, in the construction of such building, exceeded three times the requirements of the lease in

that behalf, and was also slightly in excess of the amount of its *original* capitalization, the transaction, as a whole, became *ultra vires* and void.

Second. That appellant receiver, in this suit, directly represents the United States in its sovereign capacity, and in such capacity the receiver may successfully attack any alleged *ultra vires* transaction or contract entered into by the appellee National Bank *at any time* during its entire corporate existence, even though at the time the particular contract or transaction was made, or had, the Bank was then solvent and had no creditors, and even though every stockholder of the Bank assented to the transaction or contract complained of.

While appellant does not state the foregoing propositions, in the order or exact form as above given, yet a careful examination of the brief and argument of his counsel will disclose that we have accurately expressed the chief and principal contentions upon which his case must stand or fall.

The propositions upon which *appellees* rely as decisive of this appeal in their favor may be thus stated:

First. That the lease entered into between appellee Schleier and the appellee Bank, was not an *ultra vires* act, in the proper sense of that term, neither was it an abuse or misuse of corporate power.

Second. That defendant Schleier had a right to rely upon the presumption that the lessee Bank

was taking the lease in good faith, for the sole purpose of constructing a building to be used for legitimate banking purposes, and that, during its corporate existence, the lessee would require a bank building of the size and cost stipulated in the lease, for such uses.

Third. That the lessor, Schleier, is in nowise accountable or at fault, because of the fact that the Bank lessee saw proper to voluntarily construct a building upon the demised property exceeding in dimensions and cost that called for by the lease, nor because the lessee saw proper to sub-let portions of said building, after its construction.

Fourth. That if the corporate power of the lessee Bank to enter into the least in controversy is, in any respect, questionable, the transaction would, at most, amount to a mere misuse or abuse of express corporate authority, and not a total want of power with reference to the subject-matter; and for such misuse or abuse of corporate power (if any), the government of the United States, through a suit brought directly in the name of the comptroller of the currency, under the provisions of section 5239 of the Revised Statutes of the United States, could alone complain, and the judgment authorized by such section would only extend to the forfeiture of the Bank's charter.

Fifth. Even if the entering into of the said lease should be regarded as an *ultra vires* act, on the part of the lessee Bank, in the most extreme sense in which such term is understood, nevertheless, the lessor, having complied with every provision employed in that instrument to be by him performed, the transaction having been fully *executed* upon his part,

and he never having attempted to repudiate or, in any manner, violate the terms or provisions of that instrument, there is no principle of equity jurisprudence, which would authorize the rendition of a decree against him for moneys expended by the lessee in the construction of the bank building.

Sixth. Even though the court should be of the opinion that the entering into of the lease and the various acts of the National Bank in the improvement of the property and the subsequent use thereof, were each and all *ultra vires*, the present plaintiff, as receiver of the lessee Bank, can not be heard to complain, because in this suit he merely represents a *subsequent* creditor, whose claim arose long after the making of the lease and the construction of the bank building and payment therefor.

Seventh. Even if the receiver were to be treated in this suit as the representative of the government, in its sovereign capacity, and the transactions complained of be regarded as *ultra vires* in the proper sense, no relief of the character demanded in the bill could be granted, because the visitorial power of the United States is strictly confined, under the provisions of sections 5239 and 5241 of the Revised Statutes of the United States, to a forfeiture of the franchises of a national bank for violation of any one or more of the provisions of the national banking act.

Eighth. The lessor and lessee, in good faith and for valuable considerations, having compromised, adjusted and released their respective rights and liabilities growing out of or founded upon the transactions complained of, more than two years before the commencement of this suit—the like period intervening

before the insolvency of the Bank was declared by the comptroller and the appointment of a receiver—and no fraud or fraudulent purpose being charged in the premises—the validity of the lease is not now open to attack, even though, as an original proposition, such instrument *might* have been assailable on the ground of *ultra vires*.

The learned opinion of the Circuit Court of Appeals, in this case (Transcript of Record, pages 104-111), is probably sufficient in itself to render any extended argument by us superfluous, and it is only by way of superabundant caution that we venture to elaborate upon the views there expressed.

I.

THE APPELLANT RECEIVER IS THE MERE REPRESENTATIVE OF THE SAVINGS BANK (A CREDITOR), AND HIS RIGHTS, AS COMPLAINANT, ARE LIMITED TO THOSE POSSESSED BY IT.

The receiver in this suit does not represent the government in any respect or capacity whatsoever. He represents, and can enforce, only such rights as the assignee of The People's Savings Bank might properly urge, if such assignee were the plaintiff.

The status of a receiver of a national bank, appointed (in the present instance) by the comptroller of the currency, under the provisions of the national banking law, has been frequently the subject of judicial consideration.

In Casey, Receiver, vs. Society, etc., 2 Woods', C. C., 84, the subject was thus treated:

> "The receiver holds only the estate and title of the bank in its assets; his title is the same as that of

an assignee in bankruptcy. * * * An assignment in bankruptcy, like any other assignment, by operation of law, places the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. (Citing several cases.) There seems to be no reason why the position of a receiver of an insolvent bank, under the currency act, is any better than that of an assignee in bankruptcy."

And, in section 359, High on Receivers, the rule thus expressed is declared to be "the true doctrine."

Mr. Justice Gray, in Price vs. Abbott, 17 Fed., 506, 509, in speaking of suits instituted by receivers of insolvent national banks, remarked that such suits were brought "for the exclusive benefit of its creditors."

In Kennedy vs. Gibson, 8 Wall., 498, 506, this court said:

> "The receiver is the statutory assignee of the association * * * he represents both the creditors and the association."

In Case vs. Terrell, 11 Wallace, 199, 202, it was held, the receiver of a national bank represents the bank, its stockholders and creditors, but that such officer does not, in any sense, represent the government; and, in Scott vs. Armstrong, 146 U. S., 499, 507, Mr. Chief Justice Fuller, speaking for the court, said:

> "The receiver took the assets of the Fidelity National Bank as a mere trustee for creditors, and not for value and without notice; and, in the absence of statute to the contrary, *subject to all claims and defenses that could have been interposed as against*

the insolvent corporation before the liens of the United States and of the general creditors attached."

In Fourth Street National Bank vs. Yardley, 165 U. S., 634, 653, this court, speaking through Mr. Justice White, in express terms, again affirmed the doctrine thus stated in Scott vs. Armstrong, *supra*, adding:

> "As the Fourth Street Bank contracted * * * on the faith of the representations of the Keystone Bank * * * and the fund which came into the hands of its *voluntary assignee* (receiver) is the fund, as to which the representations were made, the Keystone Bank and its *assignee* are, in equity, estopped, etc."

Here the court, in unequivocal terms, announced that the receiver of an insolvent national bank simply occupied the status of a voluntary assignee, and that such receiver is, in equity, estopped whenever the bank, which he represents, would be subject to the like doctrine.

A receiver is a mere statutory officer and derives his sole authority from the statute creating the office. It is axiomatic that such officer posseses no inherent or general powers whatsoever. His authority is such only and no more than the statute, in express terms, confers upon him, coupled with such implied powers as are essential to carry out the authority explicitly conferred.

The statutory powers of the receiver are thus expressed:

> "He (receiver) shall * * * under the direction of the comptroller * * * take possession of the books, records and assets of every description

of such association, collect all debts, dues and claims *belonging* to such association."

Sec. 5234, U. S. Rev. Stat.

It will be observed, in the enumeration of the powers thus conferred, the right to sue or the capacity to be sued is not directly conferred upon the receiver. His right to maintain an action arises solely by implication from the express power, to collect all debts, dues and claims "belonging" to the bank. The absence of such express authority to sue was commented upon by this court in Bank of Bethel vs. National, etc., Bank, 14 Wall., 383, 399-400, where Mr. Justice Clifford said:

> "Neither power to sue nor to be sued * * * is anywhere in terms conferred upon the receiver, nor upon the comptroller of the currency in any case except when he institutes a suit to forfeit the rights, privileges and franchises of the association, and in that case the provision is express that the suit shall be in his own name."

II.

THE POWERS OF THE APPELLANT RECEIVER, WHICH ARE FIXED BY STATUTE, ARE TO BE STRICTLY CONSTRUED, BECAUSE IT IS A CARDINAL RULE, IN THE CONSTRUCTION OF STATUTES, THAT STATUTORY POWERS ARE TO BE STRICTLY CONSTRUED.

Thus Mechem on Public Officers, section 511, remarks:

> "Express grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied."

This rule justifies a holding that the receiver can not maintain an action under conditions or circumstances where the banking association, he represents, would be debarred or precluded from a recovery on a similar state of facts.

This view is supported by High on Receivers, section 315, where the rule is announced that with the exception of conveyances made with the specific intent to defraud creditors, a receiver can assert no rights which could not be successfully litigated by the corporation he represents.

In Smith on Receiverships, section 255, the rule is thus expressed:

> "The powers of a receiver of a national bank are much more limited than those applicable to receiverships of corporations generally."

For the purposes of this litigation, however, we are willing to concede that a receiver of a national bank is impliedly clothed with power to attack the contracts or dealings of the bank, whose assets he is administering, when such contracts or transactions were entered into by the bank when it was in a condition of *insolvency*, with the view and intent of either defrauding its *existing* creditors, or of unlawfully preferring creditors, in violation of section 5242, U. S. Rev. Stat. The contention that the receiver is vested with any other or greater powers with reference to questioning contracts or transactions of the bank is unsupported by authority and untenable in principle.

Section 5241, Rev. Stat., reads:

> "No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice."

The only visitorial power conferred by the national bank statutes is contained in section 5239, which provides that upon a violation of any of the provisions of the act, the franchises of the bank may be forfeited in a suit brought for that purpose directly by the comptroller of the currency in his own name, coupled with the imposition of a *personal* liability upon such of the directors of the bank as participated in or assented to the violation of the act, in favor of shareholders, or others, who may have sustained injury thereby.

The most that can be said in favor of the power of the receiver in the present suit, is that he represents the insolvent Bank and its creditors, and in behalf of the latter, he is not clothed with any other or greater powers than is ordinarily vested in assignees in bankruptcy. The government of the United States, in its sovereign capacity, is not before the court as a litigant, nor in any manner represented, and even if it were, the only judgment which it could ask would be one of forfeiture of the franchises of the Bank. It is not the province, nor the duty, of the government to enforce, either at law or in equity, the payment or satisfaction of the debts or obligations of a national bank to its creditors.

The underlying principle which controls, even in a suit where the government *co nomine* is complainant, debars the receiver from a recovery, when the creditor he represents could not maintain a like suit. It is thoroughly settled in this court, that though a suit be prosecuted in the name of the United States, yet, if all the avails of the litigation will result to the exclusive benefit of a private person, the principles which will be applied in such suit are the same, without qualification, as if the controversy were wholly between private ligitants.

Thus in United States vs. Beebe, 127 U. S., 338-347, Mr. Justice Lamar, speaking for the court, said:

> "The mere use of its (United States) name in a suit for the benefit of a private suitor can not extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

For other decisions of this court in line with the foregoing, see:

New Hampshire vs. Louisiana, 108 U. S., 76.

Maryland vs. Baldwin, 112 U. S., 490.

United States vs. Des Moines, etc., Co., 142 U. S., 510.

Curtner vs. United States, 149 U. S., 662.

United States vs. Bell Co., 167 U. S., 224.

It follows logically from the foregoing premises, that if a *subsequent* creditor (whether corporate or individual) can not be heard to question the contracts or acts of his debtor, which were had and entered into before the relation of debtor and creditor existed, then the receiver in the present suit stands in no better position and possesses no other or greater rights than the particular creditor he represents.

If such creditor, personally, can not legally complain, a new cause of action is not created by the mere fact that the assets of the debtor have passed into the hands of a statutory assignee, whom the statute, in the present instance, designates by the name of receiver.

III.

CHARACTER OF TRANSACTIONS ASSAILABLE BY AN ASSIGNEE IN BANKRUPTCY, OR BY CREDITORS GENERALLY.

Having demonstrated, as we assume, that a receiver of an insolvent national bank possesses no greater powers or interest, with reference to the claims or assets of the bank, than is ordinarily the case with reference to like powers in the case of an assignee of a bankrupt, we will refer to the principles which have been firmly established in the federal courts, both supreme and inferior, on this subject.

In the early case of Mitchell vs. Winslow, 2 Story, C. C., 630, 637, it was there said by Mr. Justice Story:

> "It is a well established doctrine that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had and could himself claim and assert at the time of his bankruptcy, and consequently they are affected with all the equities which would affect the bankrupt himself, if he were asserting these rights and interests."

The same doctrine was expressly affirmed by this court in Yeatman vs. Savings Society, etc., 95 U. S., 764, 766, and in Cook vs. Tullis, 18 Wall., 332, 341, where Mr. Justice Field, speaking for the court, remarked:

> "If we * * * treat the case as one of simple *misappropriation* of property, still the trustees (in bankruptcy) must fail in their suit. They took the property of the bankrupt, subject to all legal and equitable claims of others. They are affected by all the equities which could be urged against him."

In Warren vs. Moody, 122 U. S., 132, 137, an assignee in bankruptcy sought the cancellation of a voluntary conveyance, executed by the bankrupt to his daughter, the grantor, at the time of the conveyance, having existing creditors, though not insolvent. The assignee represented such *existing* creditors in the effort to vacate the conveyance.

In holding that no recovery could be had, the court, *inter alia*, said:

> "The deed to the daughter being honest in fact and in intent, * * * and being valid as between her parents and herself, and no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which these plaintiffs can set aside the deed, as being a deed of 'property conveyed by the bankrupt in fraud of his creditors,' even though the conveyance may have been invalid, under the statute of Alabama, as against the creditors named in the bill, because it was a voluntary conveyance. Those creditors, whatever remedies they may have had to collect their debts, are not represented by the plaintiffs, as assignees in bankruptcy."

See, also, Adams vs. Collier, 122 U. S., 382, 390, 391, where it was expressly held that though a grantor was insolvent when he made a conveyance, there being no fraud intended in the making thereof, the assignee in bankruptcy of the grantor had no standing to impeach the conveyance, the court saying, in this behalf:

> "The deed was good as between the grantor and his children; and, in the absence of fraud, could not

be questioned by the assignee, who took only such rights as the bankrupt had."

And in Scott vs. Armstrong, 146 U. S., 499, from which we have already quoted, the same principles were announced, with reference to a suit by the receiver of an insolvent national bank.

These authorities would seem to be conclusive upon the proposition that a receiver of an insolvent national bank can never maintain a suit to enforce alleged claims of the creditor he represents, where, upon the facts, the bank itself would be barred, precluded or estopped from maintaining a like suit; with the possible exception of instances where the conveyance, contract or transaction assailed was made, had or entered into by the bank, when in a condition of insolvency, and with the actual intent to hinder, delay or defraud creditors, or where the bank made an illegal disposition of its assets after committing an act of insolvency with a view of illegally preferring some of its creditors to the injury of others, as expressly prohibited by the provisions of the national banking act.

In the present litigation it is clear beyond a peradventure, that the appellee Bank would have no standing in equity to maintain the present suit, as the bill does not attempt to charge that there was any fraudulent purpose upon the part of either the defendant lessor, or the defendant Bank, to hinder, delay or defraud creditors, in the entering into of the lease in controversy, nor is it charged in the bill that the appellant receiver represents any creditor or creditors whose claims were in existence at the time either when the lease was made or when the bank building was constructed and fully paid for. Moreover, no facts are charged in the bill which disclose any violation, either in letter or

spirit, of the national banking act, prohibiting illegal preferences of creditors.

In passing from this branch of the discussion, we may further remark that no well-considered case can be found, distinctly recognizing the right of a receiver of an insolvent national bank to recover money or property paid out or expended by the bank, under an *ultra vires* contract (actual fraud apart), where the circumstances of the case were such that the bank itself would have no standing as a litigant, to recover such money or assets.

We might, therefore, concede, arguendo, that the execution of the lease and the expenditure of moneys by the bank, in the improvement of the leased property, were each and all *ultra vires*, to the full extent contended for by appellant, and at the same time successfully insist that appellant, in his official capacity, as receiver, has no legal standing to maintain this suit.

IV.

SUBSEQUENT CREDITORS, OR A RECEIVER OR ASSIGNEE REPRESENTING THEM, CAN NOT MAINTAIN SUITS IN EQUITY TO RECOVER MONEY OR PROPERTY OF THEIR DEBTOR EXPENDED OR PAID OUT BEFORE THE CLAIMS OF THE CREDITORS AROSE, EVEN THOUGH SUCH MONEYS OR PROPERTY WERE PARTED WITH BY THE DEBTOR WITHOUT CONSIDERATION, OR, IN THE CASE OF CORPORATIONS, UNDER ULTRA VIRES CONTRACTS.

Among the multitude of authorities which might be cited in direct support of the proposition thus stated, we refer to the following:

Central Trust Co. vs. Columbus, etc., Ry. Co., 87 Fed., 815, 824.

Graham vs. Railroad Co., 102 U. S., 148, 154.

Porter vs. Pittsburgh Bessemer Steel Co., 120 U. S., 649, 673.

Ayres, etc., vs. Dorsey, 70 N. W., 111, 112.

Hamilton vs. Menominee Falls Quarry Co., 81 N. W., 876, 879.

2 Morawetz on Corporations, sections 707, 800.

5 Thompson on Corporations, section 6030.

Taylor on Private Corporations, section 280.

Central Trust Co. vs. Worcester Cycle Co., 110 Fed., 491, 493.

Allis vs. Jones, 45 Fed., 148, 150.

Continental Trust Co. vs. Toledo, etc., Co., 82 Fed., 642, 656.

Fidelity Co. vs. West Penn., etc., Co., 138 Pa. State, 494.

These authorities are conclusive in favor of the proposition that, if the moneys of the National Bank expended in the improvement of the demised premises and sought to be recovered in this suit, can be properly treated as outlays made under an *ultra vires* contract, nevertheless the plaintiff receiver of the Bank cannot maintain this suit because the single creditor whom he represents, is not averred in the bill, to have been such creditor prior to or contemporaneous with either the making of the lease, or the expenditure of the moneys sought to be recovered, coupled with the further circumstance that there is no pretense or claim that such lease was entered into or the moneys applied, with the view or intent of defrauding, hindering or delaying any *future* creditors of the Bank.

V.

THE PROPERTY OF A SOLVENT NATIONAL BANK, OR OTHER CORPORATION, IS NOT IMPRESSED WITH ANY TRUST IN FAVOR OF FUTURE CREDITORS, HENCE A TRUST OR EQUITY DOES NOT ARISE IN FAVOR OF SUBSEQUENT CREDITORS OF A SOLVENT BANK OR CORPORATION, BY REASON OF IMPROPER OR UNAUTHORIZED EXPENDITURES OF CORPORATE MONEYS, MADE BY SUCH BANK OR CORPORATION WHILE SOLVENT.

The dominant idea upon which this suit is brought, and upon which its successful maintenance must necessarily rest, may be thus stated:

1. The expediture of its moneys by a national bank in carrying out the provisions of an *ultra vires* contract, is a void and illegal act.

2. Such expenditure of corporate moneys constitutes a misappropriation and unlawful application of trust funds.

3. The assets of a solvent corporation constitute a trust fund in favor of its creditors and shareholders.

It will be seen at a glance that each and every of the foregoing postulates must be accepted by the court as legal axioms before even a semblance of a cause of action is made out by the averments in the bill. If the alleged trust be found non-existent, then appellant's entire case falls for the want of a foundation or basis upon which to rest; and we assert, with justifiable confidence, that this court is irrevocably committed to the doctrine that the property of a solvent corporation is never impressed with any character of trust, even in favor of its existing, and never in favor of subsequent creditors.

In Graham vs. Railroad Co., 102 U. S., 148, 153, 154, 161, the court, through Mr. Justice Bradley, reviewed at length the status of subsequent creditors with reference to prior voluntary conveyances made by the debtor, together with the question whether said subsequent creditors would have any standing to attack previous conveyances made by the debtor, wherein the debtor was defrauded by the grantee; and the court held that such subsequent creditors could neither attack a voluntary conveyance made by the debtor before the credit arose, nor a conveyance of property by the debtor wherein actual fraud had been practiced upon him, the latter not seeing proper to rescind the conveyance; that in either case the subsequent creditor was not injured by the transaction.

On pages 160 and 161 the court specially considers the status of the assets of a corporation debtor, and the theory that the corporation holds its property as a trustee for the benefit of stockholders and creditors, is expressly repudiated. The court concluded with these observations:

> "We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

In Hollins vs. Brierfield C. & I. Co., 150 U. S., 371, the so-called trust fund doctrine was again considered and again discountenanced.

Mr. Justice Brewer, speaking for the court, *inter alia*, said:

> "Solvent, it (corporation) holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien."

Further on in the opinion the following remarks, apropos of the pending controversy, were used:

> "A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

In Pullman's Palace Car Co. vs. Transportation Co., 171 U. S., 138, the facts were: The property and assets of the transportation company had been demised to the Pullman Company, under lease, which the court held was an *ultra vires* transaction for divers reasons wholly foreign to the case at bar; but in the course of the opinion, the court anew repudiated the idea that any character of trust relation arose by virtue of the change of possession of the corporate property, pursuant to the *ultra vires* contract, saying, on page 159 (italics ours):

> "There is no question of *trustee* in the case. The property was placed in its hands by the lessor, and in accordance with the terms of the agreement. It was not then impressed with any *trust*, according to any definition of that term known to us."

In other words, where the party receiving the property of a corporation, under an *ultra vires* agreement, neither repudiates the contract, nor attempts to disregard any of its obligations, no trust relation of any character would arise.

In McDonald vs. Williams, 174 U. S., 397, the facts were, that a solvent national bank, in direct violation of the provisions of section 5204, U. S. Rev. Stat., paid out certain of its capital to its stockholders in the form of dividends, a confessedly *ultra vires* act, in the most extreme sense of that term. The bank subsequently becoming insolvent, the receiver thereof attempted to recover the dividends so paid from the stockholders receiving the same. In again discountenancing the existence of any supposed trust-fund doctrine, the court, in the course of the opinion, remarked:

> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid, on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

In our judgment, these repeated rulings by this court effectually dispose of appellant's contention, that the moneys expended in the improvement of the demised premises constituted a trust fund, recoverable in this suit for the benefit of the Bank's creditors. No such trust exists, for the reason that the Bank was presumably solvent when it executed the lease and constructed and paid for the building, as *no averments to the contrary appear in the bill.* The claim of the Savings Bank, which the receiver represents, not being then in existence, both it and the receiver, in legal contemplation, are total strangers to the transactions now assailed, and hence there is an utter want of equity in the bill of complaint.

A recent decision by the Supreme Court of Wisconsin is in direct accord with the views of this court, with reference to the so-called trust fund doctrine. We refer to Marvin vs. Anderson, 111 Wis., 387, where the court remarked:

> "The rule under which, in any case, the property of a corporation is deemed a *trust fund* for creditors and stockholders, or either, is wholly a creation of courts of equity, and that only those have equitable rights in a fund at the time of its depletion who have *then* a right to resort to such fund to satisfy their claims. Creditors of a corporation are not presumed to have relied upon property of their debtor, which it did not possess when the indebtedness accrued, and therefore are not held to have any equitable claim thereon."

VI.

THE TRANSACTIONS HEREIN COMPLAINED OF BY APPELLANT WERE NOT ULTRA VIRES.

We now turn our attention to the question of whether the execution of the lease was an *ultra vires* act on the part of the lessee bank, in the proper sense of that term.

Ultra vires, in the true conception of the phrase, exists only where there is an *entire* want of power over the subject-matter of a given contract. Where authority exists to acquire a particular class of property, but such right is exceeded or abused in the given instance, as to amount or purpose, it is settled law in this court that no one but the government can be heard to complain, and the remedy is merely that of forfeiture of corporate franchises. As between the parties to the contract, where the corporation merely abuses

or exceeds its corporate authority, the defense or claim of *ultra vires* is unavailable.

Our present contention, however, is that, upon the facts stated in the bill, it does not appear that the appellee Bank even abused or exceeded its corporate authority; much less was it guilty of acting where a total want of power existed.

Among the express powers the national bank act vests in a banking association are the following:

> "To make contracts."
>
> Section 5136, Rev. Stat.

> "To purchase, hold and convey such real estate as shall be necessary for its immediate accommodation in the transaction of its business."
>
> Section 5137, id.

To these are to be added the implied power to lease or construct a suitable banking house in which to transact its usual business, pursuant to the provisions of section 5190, id.

Under the powers thus conferred by the federal statutes, we submit, the lease in question was a valid, lawful contract.

A liberal policy has always prevailed in this court, with reference to *incidental* powers of a corporation in the carrying out of the objects for which it was created:

See:

> Green Bay, etc., Co. vs. Union, etc., Co., 107 U. S., 98, 100.
>
> Ft. Worth Co. vs. Bridge Co., 151 U. S., 294.
>
> Navigation Co. vs. Hooper, 160 U. S., 514.
>
> U. P. Ry. Co. vs. C. R. I., etc., Co., 163 U. S., 564.

In all parts of the United States, national banks lease property for carrying on their banking business, and their power so to do has been recognized by the comptroller and upheld by the courts.

Schofield vs. Bank, 97 Fed., 282, 287.
McCormick vs. Bank, 165 U. S., 538.
Bank vs. Deposit Co., 161 U. S., 1.

As already pointed out, section 5137, U. S. Rev. Stats., vests a national banking association with the express power to "purchase, hold and convey" real estate for certain enumerated purposes.

It has frequently been decided that the term "purchase" properly includes the acquisition of a leasehold interest in realty.

Thus, in Hackett vs. Emporium, etc., 24 At., 627, 628 (150 Pa. St., 220), the Supreme Court of Pennsylvania decided:

> "The legal meaning of the word 'purchase' includes all modes of acquisition, except that by descent. A lessee is a purchaser as truly as he who becomes grantee in fee. The difference is in the estate acquired. The estate of the former is a leasehold, of the latter a freehold; but the mode of acquisition is by purchase in both cases."

In Spielmann vs. Kliest, 36 N. J. Eq., 199-203, it is said:

> "Is a lessee a purchaser?"

The court then refers to Blackstone's familiar definition of title by purchase, adding:

> "And among the instruments mentioned under the head of alienation, by which a right to the possession of lands may be acquired, leases are enumerated. 2 Blackstone Com., 310. And Cruise says that every lessee is a purchaser by his contract and covenants. 1 Greenlf., Cruise, 403, chapter 1, paragraph 80."

See, also, Smoot et al. vs. Legatt, 1st Stewart (Ala.), 590, 598, where Judge Saffold, speaking for the Supreme Court of that state, said:

> "The term purchase is appropriate either to the conveyance of a *lease* or *fee*." (The italics are those of the court.)

The authority of the Bank to take a lease of real property for the construction thereon of a suitable bank building is, therefore, not open to reasonable question.

The word "necessary," as used in the national banking act, in reference to the amount of realty which a national bank may acquire for banking purposes, or the size or cost of the banking building that it may erect, is to receive a liberal and not a narrow construction.

In this connection, see the remarks of Chief Justice Marshall, in McCulloch vs. State, 4 Wheat., U. S., 316, where he says, in effect, that the word "necessary" is a comparative term, without any fixed or restricted meaning.

The question then arises whether or not the right to make this lease and construct the bank building was incidental to the objects for which the defendant National Bank was created. If this is answered in the affirmative, it follows that such transactions were not even in excess of or an

abuse of the Bank's powers, as conferred upon it by the statute.

A building, for instance, which would be deemed necessary, that is, reasonably convenient, by a bank, for its business in a city, might not be deemed necessary in a country town. Regard should be had to the fact that national banks, in order to properly discharge their functions to the public, must have their banking houses conveniently located with reference to the heart of the business locality in the town or city where they may be engaged in doing business.

Common usage and long acquiescence by the government has tacitly recognized the right of national banks to do business in the larger and more expensive buildings located in the commercial centers of the country; where a building such as is commonly used for banking purposes can not be rented, the bank perforce must build. If desirable ground can not be purchased outright, then it must be leased; and the lessor of property situate in the heart of the traffic section of the city would naturally object, as a business proposition, to an inexpensive or shabby building being constructed upon his property for a long term of years.

Suppose, for illustration, that a banking institution should buy or lease a plot of ground which was surrounded on either side by large costly structures. Is it the policy of the law, under such circumstances, that the bank should be compelled to build a structure not to exceed, say, one story in height, merely because a building of that dimension was all that was absolutely essential or indispensably necessary to enable it to contain its present vaults, store rooms and banking offices? Common sense would say "no," and yet, if the bank constructs a building in keeping with other structures in the immediate neighborhood, and furthermore, in appearance similar to those occupied by other banking institu-

tions of a like character, it must, of necessity, be permitted to rent the surplus rooms until such time as the growth of the business of the bank may necessitate the use of the entire building. In short, the right to construct or rent a building of such size, appearance, and situate in such a locality as is usual and customary for national banks in good standing to occupy, together with a right to lease the unused portion of such building, must be regarded as "incidental" to the right to acquire and hold real estate for banking purposes. The rent which the bank receives for the unused portions of the building in a measure reimburses it for the outlay in the original construction, and when that is the sole purpose for which such rooms are rented, the spirit of the law can not be said to be violated under those circumstances.

Any other construction would impose upon the courts the duty of enjoining or restraining national banks from constructing or renting buildings for banking purposes in excess of what the court might be of the opinion was absolutely indispensable for the needs of the bank. It is fair to presume that the directors of the People's National Bank, and the comptroller of the currency, considered the lease in controversy as the very best possible arrangement that the Bank could make, in order to obtain suitable quarters for its business.

We believe, therefore, that a wide discretion was designed to be vested in the board of directors of national banks, with reference to the size, character and locality of the buildings which they might construct or acquire for banking purposes. Where the bank does not engage, or attempt to engage, in any other business than that of legitimate banking, the mere fact that it rents the unused portions of its banking building, so as to thereby reimburse itself for the moneys necessarily expended in the construction of a building such

as is usually and generally occupied by banking institutions throughout the country, no violation of law is thereby committed.

There is nothing in the law which limits the rental the bank shall pay, or the cost of the building it shall occupy. If Congress had intended to allow no discretion to national banks as to the rentals they should pay or the price they should give for the purchase of their banking houses it would certainly have been a very easy matter for it to have done so. There was no requirement in the lease that the building should cover the whole of the leased ground. All it required was a four-story building. It did not require the expenditure of $305,000, but only of $100,000. Many national banks throughout the country own buildings, part of which they occupy and part of which they rent, far larger as to size and far more expensive as to construction than the building provided for in the written lease between the People's National Bank and Mr. Schleier.

This court, in the leading case of Bank vs. Matthews, 98 U. S., 621, 626, 629, in announcing the general rule that violations of the national banking act in the matter of contracts entered into by a national bank, were subjects which could not be inquired into by any one except the government, and then only in a suit to obtain a forfeiture of the charter of the corporation, referred with approval to Leazure vs. Hillegas, 7 S. & R., 313, remarking of this case:

> "This authority is elaborate and exhaustive upon the subject."

Now, if we turn to the case of Leazure vs. Hillegas, we find it decides that, under a bank act and under a charter which authorized a bank to have, hold, purchase, etc., lands, etc., provided such lands and tenements should only

extend to such lot or lots of ground and building as it might find "necessary" to carry on the business of said bank, etc., and should actually occupy, that a purchase by a bank was good, though it related to lands in a distant county which the bank did not occupy.

In the principal case, this court also cited with approval The Banks vs. Poitiaux, 3 Randolph, 136, the court in the latter case saying:

> "The Bank of Virginia and the Farmers' Bank of Virginia, finding it expedient to erect buildings in the city of Richmond for the transaction of their business, purchased a piece of ground for that purpose, and erected the buildings. After this was done there remained a vacant space on each side of the bank buildings, on which they determined to erect fire-proof brick houses for the greater security of the banks, and to sell them out to individuals.
>
> "The charters of the Bank of Virginia, and of the Farmers' Bank, after authorizing them to purchase, hold and enjoy lands and tenements, goods and chattels, to a specified value, and sell and dispose of them, provided that the lands which it shall be lawful for them to hold shall be only such as shall be requisite for their 'immediate accommodation,' etc., or acquired in satisfaction of debts, etc. * * * It is insisted that the lands which the banks sold to the appellee were not acquired in satisfaction of debts, etc., and were not requisite for their immediate accommodation, etc., according to the charters; and that, therefore, the banks could not acquire any title to such land, and could not convey any title to the purchaser from them; or if they could,

that as the purchase and sale were contrary to the policy of the law, a court of equity *ought not to assist them by enforcing the contract.*

"It seems to me that *the charters are only directory in this respect. They interpose no penalty in terms. They do not declare the purchase by, or conveyance to, the banks, to be void, nor vest the title in the commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer the title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding in a suit by the commonwealth.*

"This case does not fall within the principle of Wilson vs. Spencer, 1 Rand., 76. In that case an association of individuals dealt in a manner utterly prohibited by law, and a contract founded on those unlawful dealings was declared to be void.

"In this case *the statutes do not prohibit the purchase of real property by the banks; but only limit the extent of such purchases; and the question, whether they have or have not exceeded the limits prescribed to them, is not fit to be tried in this suit, and at the instance of this party.* But if it were the duty of the court to inquire, in this case, whether the banks had, in the purchase in question, exceeded the limits prescribed by their charters, I should say *they had not.* If they had kept the ground not covered by their banking houses, for gardens, they could not have been charged with a violation of their

charters; and, using it in a way to secure the banking houses against fire, was equally innocent, although they combined with that object the other of getting a reimbursement, in part, of the cost of the land."

The case last cited is peculiarly in point, because it construes the words, "requisite for their immediate accommodation," which are in meaning the same as "necessary for its immediate accommodation," found in the national banking act, and the construction given such terms is not the narrow one contended for herein by appellant's counsel.

Nor is the objection, that a national bank can not lawfully take a lease of real property for the purpose of constructing thereon a bank building, when the leasehold term exceeds the period prescribed for the corporate existence of the bank, tenable. The point is fully discussed in the opinion of the Court of Appeals in this case.

See transcript of record, page 107, and authorities cited. The reasoning there advanced and cases noted render unnecessary any further discussion of this particular proposition.

The further objection, that the aggregate amount of rentals stipulated to be paid for the use of the demised premises, constitutes an indebtedness or liability in excess of the limitations imposed by the national banking act, is also fully answered by the reasoning, and authorities cited in the same opinion, record, page 108, to which reference is hereby made. If the court desires to examine other authorities upon the same subject, see

MacBean vs. Fresno, 112 Cal., 159.
Smith vs. Dedham, 144 Mass., 177.
Saleno vs. Neosho, 30 S. W., 190.
Woods vs. Oklahoma, 37 Pac., 1094.

In re Mahler, 105 Fed., 428-30.
Bosler vs. Kuhn, 8 Wat. & S., 183.
Dallas E. Co. vs. City of Dallas, 58 S. W., 153.
Budd vs. Budd, 59 Fed., 735.
City of Dawson vs. Dawson Co., 32 S. E., 907.
E. St. Louis vs. E. St. Louis G. Co., 98 Ill., 415.
Weston vs. Syracuse, 17 N. Y., 110.
Cunningham vs. City of Cleveland, 98 Fed., 657.
Lamar, etc., vs. Lamar, 31 S. W., 756.
Atkins vs. Wilcox, 105 Fed., 595.
Savory vs. Stocking, 4 Cushing, 607.

The application of the principle under consideration to the case at bar is in no wise affected, whether a national bank be regarded in the light of a private or quasi public corporation, because, if it might be treated for some purposes as a corporation of the latter class, with reference to contracts entered into by it in acquiring realty, for the construction of a banking house, it would be regarded *quoad hoc*, as a strictly private corporation.

Thus, in City vs. Gardner, 97 Ind., 1, the court, in speaking of the power exercised by a municipal corporation in the acquisition of property, remarked:

> "The power to execute a contract for goods, houses, gas, water, and the like, is neither a judicial or a legislative power, but is purely a business power."

See, also, Western, etc., Society vs. Philadelphia, 31 Pa. St., 185, 189, where it was remarked:

> "The distinction between public duties and private business is wide and obvious."

See, also, Illinois Trust, etc., vs. City, 76 Fed., 271, where the Circuit Court of Appeals, for the Eighth circuit, sharply draws the distinction between the exercise of public duties on the part of a strictly public corporation and the private or proprietary functions of such corporation in the acquisition of property, holding that, with reference to the latter class of dealings, the corporation is to be treated and governed by the same rules as apply to a strictly private corporation.

A separate and additional reason why the covenants contained in the lease for the payment of rent can not be treated as imposing an obligation or creating an indebtedness upon the Bank lessee for the payment of rent during the whole of the demised term, is the principle that executory contracts on the part of corporations, whether for the payment of rent or otherwise, cease to be operative or enforcible against the latter for any and all purposes, when the corporation becomes legally dissolved by lapse of time prescribed by law for its corporate existence, though remaining enforcible as against an assignee. In other words, in legal contemplation, the covenants in the lease for the payment of rent would be binding only upon the corporation during its corporate existence, and thereafter be enforcible only against the assignee of the leasehold interest, if such lease were assigned by the corporation, or its legal representatives, before the expiration of its corporate charter.

For divers cases where this principle was announced, see

People vs. Globe, etc., Co., 91 N. Y., 174.
Lorillard vs. Clyde, 142 N. Y., 456.
Griffith vs. Blackwater, etc., Co., 46 W. Va., 56.
Fidelity, etc., Co. vs. Armstrong, 35 Fed., 567.

The foregoing authorities settle the following propositions beyond cavil:

First. That a corporation may lawfully take a lease extending beyond its corporate existence, and that such lease is valid for purposes of enjoyment and alienation by the lessee.

Second. That both parties to the lease must be assumed to have contracted with reference to the statute limiting the corporate existence of the lessee, and that the obligation to pay rent is coupled with the *implied condition* that such obligation shall become wholly inoperative for all purposes as against the *lessee*, when it becomes legally dissolved by efflux of time.

Third. Covenant to pay rent, thus falling with the legal demise of the corporation lessee, no claim for damages, either legal or equitable, could be predicated upon the fact that the corporation would be non-existent for the purpose of meeting the future installments of rent as they would mature, subsequent to the legal dissolution of the corporate life of the lessee.

Under the principles thus established, it will be seen that the covenant to pay rent was only binding upon the corporation lessee during the remainder of its corporate existence, which, in the case at bar, would amount to a little over nineteen years from the time the first installment of rent would mature. Multiplying the annual installments of rent by that number, it would be found that the aggregate amount of rent payable during the corporate life of the lessee Bank would be many thousands of dollars less than the amount of its *original* authorized capitalization.

The contention that the lessee saw fit to sub-let the unused portions of the bank building for the purpose of realizing an income is wholly without merit, the rule being thoroughly settled that it is not *ultra vires* for a corporation to rent or otherwise dispose of property or assets which it may not require for its immediate corporate purposes. This principle was well stated by the Supreme Court of Illinois, in People vs. Pullman's Palace Car Co., 175 Ill., 125, 139, where it was said:

> "The right of the appellee (Pullman Company) to construct an office building is indisputable, and so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probably prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to and prepare for the future. It was but true economy to do so, and, if it proceeded in good faith, no reason is perceived why it should be deemed bound by law to permit such parts of the building as are not for the present required for the accommodation of its business to remain vacant; but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices."

For other decisions to like effect, see

Central Trust Co. vs. Columbus Co., 87 Fed., 815, 823-8.

Chicago, etc., Co. vs. Union Pacific Ry. Co., 47 Fed., 15-25.

Id., 163 U. S., 564.

Clark & Marshall on Private Corporations, volume 1, page 391, and authorities cited foot note 108.

VII.

WHERE THE VALIDITY OF A PARTICULAR ACT OR CONTRACT ON THE PART OF A CORPORATION IS CHALLENGED AS BEING IN EXCESS OF ITS POWERS, AND THERE ARE ANY CIRCUMSTANCES UNDER WHICH SUCH CONTRACT OR TRANSACTION MIGHT BE AUTHORIZED, PRIMA FACIE SUCH CONTRACT IS TO BE DEEMED VALID AND THE BURDEN OF ALLEGING AND SHOWING EVERY FACT EVINCING ABSENCE OF POWER RESTS UPON THE ONE WHO ASSAILS SUCH ACT OR CONTRACT.

This proposition is based upon the maxim *omnia acta rite esse præsumuntur*, and under its operation the bill in the case at bar utterly fails to state a case affirmatively disclosing that the lessee Bank acted in any respect in excess of its chartered powers, or in violation of the letter or spirit of the national banking laws, in the making of the lease and in the construction of the Bank building complained of.

The theory of the bill is, that such lease was void because the *aggregate* installments of rent provided for by that instrument, coupled with the covenant to expend one hundred thousand dollars ($100,000) in the construction of a substantial four-story building upon the demised premises, constituted the creation of an indebtedness or incurring of

a liability in excess of the *original* capitalization of the lessee bank, viz., three hundred thousand dollars ($300,000), and this charge constitutes the real gravamen of appellant's case.

We could safely concede the premises contended for touching the aggregate amount of indebtedness or liability incurred by the lessee in entering into the lease, but nevertheless, the case, as stated, would fall far short of establishing any violation of the banking act by reason of the transactions complained of.

The pleader informs the court that three hundred thousand dollars ($300,000) was the amount of the *original* authorized capitalization of the defendant appellee Bank, but studiously avoids negativing the fact whether such capitalization was or was not subsequently increased, as authorized by the provisions of the act of May 1, 1886, 24 Stat., 18, which expressly empowers national banks to increase their capitalization to any amount which may be approved of by the comptroller of the currency.

The limitation of indebtedness imposed by section 5202, Rev. Stat. U. S., is not based upon the amount of the bank's *original* capitalization, but, on the contrary, the statute in express terms applies to the capital stock of the bank as it may exist at the time of the incurring of any particular indebtedness.

Hence, for aught that appears in the bill, the capital stock of the appellee Bank may have been duly increased and actually paid in to an amount sufficient to equal every dollar of conceivable indebtedness or liability assumed or incurred under the provisions of the lease, even though it were conceded that the aggregate amount of rentals for the full demised period could be properly treated as the incurring of an indebtedness or liability within the purview of said section 5202; and for the purposes of this suit it is proper

to indulge in the presumption that the capital of the Bank was so increased, prior to the making of the lease, if such presumption be necessary in order to uphold the transactions complained of.

The principle here contended for has been repeatedly recognized by this court.

Thus, in Merchants' Bank vs. State Bank, 10 Wall., 604, 644, the court, *inter alia*, stated that it was an axiom in the law of corporations that

> "if the contract can be valid under *any circumstances*, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

This case was subsequently referred to with approval in Louisville, etc., Ry. Co. vs. Louisville, etc., Co., 174 U. S., 552.

In Railway Co. vs. McCarthy, 96 U. S., 258, 267, Mr. Justice Swayne, speaking for the court, said:

> "When a contract is not on its face *necessarily* beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

And in Express Co. vs. Railroad Co., 99 U. S., 191, 199, the same judge remarked:

> "The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear."

And in Central Trans. Co. vs. Pullman's Co., 139 U. S., 24, 60, Mr. Justice Gray, as the organ of the court, remarked:

> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites *might in fact have been complied with.*"

A statute of Tennessee provided that in case of increase of capital stock, the corporation so increasing should pay a certain privilege tax, and prohibited in the most explicit terms the exercise of any corporate powers until such tax should be first paid.

Notwithstanding such statute, the Circuit Court of Appeals for the Sixth district, in Peck vs. Elliott, 79 Fed., 10, 18, held (in a suit to enforce subscription to increased capital), that *it would be presumed* such tax had been paid until the contrary was affirmed and shown. In other words, it would be assumed that the corporation had complied with the law.

In Maricopa, etc., Co. vs. Arizona, 156 U. S., 347; 15 S. C. Rep., 391, 393, the court applied the doctrine under consideration to a case where Congress had granted a right of way for the construction of the Maricopa & Phœnix line of railway through the Pima-Maricopa Indian reservation in the territory of Arizona, subject, however, to the express condition, that before any of the lands, upon such reservation, could be taken for railway purposes, "the consent of the Indians thereto shall be obtained in a manner satisfactory to the president of the United States."

While it appeared from the record that the railway line had been built into and through the reservation, it was not

affirmatively alleged or proved that the Indians had given their consent thereto, as required by the act, and it was urged that no lawful right to construct the railroad therein appeared. The court disposed of the point, however, by saying:

> "As the company has taken the rights granted by the statute, the legal presumption of duty performed ('omnia rite,' etc.) requires us to assume that the consent was given in accordance with law."

We, therefore, feel justified in announcing the broad proposition, that the bill fails to state sufficient facts which clearly and affirmatively disclose that the transactions assailed were *ultra vires* in any sense of that phrase known to the law. The bill, moreover, fails to aver that appellee, Schleier, when he executed the lease, had any notice or knowledge that the lessee Bank contemplated any violation whatsoever of the provisions, or any of them, of the national banking act, either as to the size or cost of the banking building to be erected upon the demised premises, or the use to which such building might be subsequently devoted, and it is elementary law that, before a contract can be assailed by a corporation, or any one representing it, on the theory of *ultra vires*, notice must be brought home to the other contracting party at the time the transaction is entered into, that the corporation was then engaged in the doing of an act unauthorized by its charter.

In conclusion, upon this branch of the case, we may remark that the claim of appellant, that a national bank has no power to enter into covenants in a lease for the construction of a building, even though the same be designed for use in carrying on its banking business, is so puerile that we do not deem it worthy of serious refutation. The express power to make contracts conferred by the national banking

act upon national banks must certainly be deemed broad *enough to authorize it to contract for the construction of a* bank building.

VIII.

CONCEDING, ARGUENDO, THAT THE ENTERING INTO OF THE LEASE BY THE APPELLEE BANK WAS AN ACT IN EXCESS OF ITS CHARTERED POWERS, OR FOR A PURPOSE NOT AUTHORIZED BY LAW, NEVERTHELESS, SUCH MISUSE OR ABUSE OF CORPORATE POWERS IS NOT ULTRA VIRES IN THE SENSE THAT THE BANK, ITS RECEIVER OR ITS CREDITORS, CAN BE HEARD TO COMPLAIN.

The national banking act, after vesting the banking associations with divers and sundry express powers, among them the power to make contracts, to purchase, hold and convey real estate, for certain purposes and to a limited extent, then imposed certain limitations with reference to the manner in which the banking privileges and franchises may be exercised. Nowhere in the act, however, is it declared that if a banking corporation shall purchase or acquire a greater amount of real estate than it may require for legitimate banking purposes, or in part for an unauthorized purpose, that its act or contract in that behalf shall be void or subject to attack by any private person whomsoever. Indeed, the act, as a whole, seems to be drafted with a view of excluding the idea that contracts entered into by a bank, merely in *excess* of its chartered powers, or where an authorized contract is entered into for some unauthorized purpose, that in either case the validity of the contract can ever be questioned for the purpose of defeating a recovery thereon or rescinding the same. But one penalty is provided for where the provisions of the act, or any of them, may be violated by the bank, and that is contained in section 5239. The penalty there prescribed is: First—The forfeiture of

the bank's franchises and the dissolution of the association, in a suit brought directly in the name of the comptroller of the currency for that purpose. Second—That, where a shareholder or other person may sustain damage arising from such violation or violations, an action may be maintained by the party or parties injured against the offending directors *personally*, who consented to or participated in such violation or violations. This is the alpha and omega of penalty or liability prescribed by the statute in case of mere misuse or abuse of chartered powers by a national bank.

Under a variety of circumstances, where national banks were guilty of entering into contracts in violation of one or more of the sections or provisions of the national banking act, this court has uniformly adhered to the doctrine that the only penalty which could be imposed was a forfeiture of charter, and that no one but the government, in a direct suit for such purpose, could be heard to question the validity of the acts complained of. We need but refer to the following leading cases on the subject to establish the correctness of the proposition just stated:

Bank vs. Matthews, 98 U. S., 621.
Reynolds vs. Bank, 112 U. S., 405.
Mining Co. vs. Bank, 96 U. S., 640.
Bank vs. Stewart, 107 U. S., 676.
Bank vs. Whitney, 103 U. S., 99.
Thompson vs. Bank, 146 U. S., 240.
Fritts vs. Palmer, 132 U. S., 282.
Jones vs. Habersham, 107 U. S., 174, 188.
Cowell vs. Springs Co., 100 U. S., 55, 60.
Hitchcock vs. Galveston, 96 U. S., 341, 351.
McDonald vs. Williams, 174 U. S., 397.

In the early case of Harris vs. Runnels, 12 How. (U. S.), 79, 84, the principle underlying the foregoing decisions was expressed in these words:

> "It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it."

And the doctrine thus stated has been consistently followed by this court.

The logic of the principle established by these cases unerringly leads to this conclusion: That even where it conceded that the appellee Bank exceeded its chartered power, with reference to the amount of indebtedness or liability created or assumed by the terms of the lease, and further exceeded its chartered power with reference to the cost and size of the bank building erected upon the demised premises, nevertheless, as the Bank possessed the general power to purchase and acquire real estate, either in fee, or by leasehold interest, and was further vested with the general power to contract indebtedness for such purpose, no one but the government could be heard to complain of such misuse or abuse of its general powers, and then only for purposes of forfeiture of franchises.

The lease, including all its obligations, notwithstanding such misuse or abuse of corporate power, would remain valid and enforcible as between the parties thereto and their privies, and hence the doctrine of *ultra vires*, in its true acceptation, has no legitimate application in the pending controversy.

IX.

THE APPELLEE NATIONAL BANK AND THE APPELLANT RECEIVER, AS ITS STATUTORY ASSIGNEE, ARE ESTOPPED TO URGE THE INVALIDITY OF THE LEASE IN CONTROVERSY.

While it may be said to be the settled doctrine of this court that a corporation, or its representative, will not be estopped to challenge the validity, under some circumstances, of a contract entered into by it, where such contract was *ultra vires* in the *extreme* sense of the term, i. e., absolutely void at the time of its execution because of a total want of power to enter into a transaction of the character involved, nevertheless, it is also settled in this tribunal that where the contract was merely voidable in its inception, and not absolutely void, the principle of estoppel *is* applicable.

In Sioux City, etc., vs. Trust Co., 173 U. S., 99; 19 S. C. Rep., 341-346, Mr. Justice White, as the organ of the court, said:

> "The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its application to contracts which were merely voidable."

The utmost line of argument, savoring even of plausibility, which can be urged against the validity of the transaction assailed, is to the effect that the appellee Bank merely abused or exceeded its express corporate powers.

As already pointed out, express statutory authority existed in its behalf to acquire real property necessary to enable it to carry on its banking business.

Power to contract indebtedness, subject to certain limitations, was also directly conferred. The general power

to enter into contracts is likewise in terms granted by the national banking act. In taking the lease, and in contracting whatever indebtedness or liability was assumed thereby, the Bank was acting strictly within the scope of its express chartered powers.

Arguendo merely, it may be conceded that such authority was abused or exceeded in the given instance; nevertheless, under the authorities already cited, the proposition is settled beyond cavil that, as the statute does not in terms declare the particular contract to be void because of such abuse or excess, no one but the government can be heard to complain, and then only for the purpose of charter forfeiture.

Hence the Bank and its representative, the appellant receiver, are now estopped from questioning the validity of the lease or the surrender thereof. The presence of the essential elements of estoppel are obvious. The Bank voluntarily entered into the contract in question; received possession of the demised premises from the lessor; held and enjoyed the use and possession thereof for years; required the lessor to remove buildings situate thereon at the time of the execution of the lease, and in every conceivable manner recognized and treated the lease and all of its terms as lawful, binding obligations for nearly ten years before the same was finally, by mutual agreement, canceled and surrendered.

Again, the cancelation and surrender of the lease were voluntarily solicited by the Bank solely for the purpose of relieving itself from present indebtedness to the lessor, and to absolve itself from future, accruing, onerous obligations resulting manifestly from unanticipated changed conditions seriously affecting the intrinsic value of the demised premises as it existed at the time the surrender was effected.

All these acts being had and done in the utmost good faith on the part of both lessor and lessee, so far as aught that appears in the bill by due averment to the contrary,

the salutary principles underlying the doctrine of estoppel now preclude the appellant from maintaining this litigation upon the sole, dry, naked, legal proposition that the lease was originally a voidable instrument, because of the mere alleged abuse or excess of the Bank's charter powers in becoming a party thereto.

X.

EVEN IF A CONTRACT BETWEEN A CORPORATION AND ANOTHER MAY BE SAID TO BE ULTRA VIRES IN THE EXTREME SENSE, NEVERTHELESS, IF SUCH CONTRACT BE FULLY EXECUTED, IN GOOD FAITH, BY THE OTHER PARTY, THE CORPORATION, OR ITS PRIVIES, CAN NOT MAINTAIN AN ACTION TO RECOVER MONEYS EXPENDED BY THE CORPORATION, PURSUANT TO SUCH CONTRACT.

In considering the doctrine of ultra vires, as expounded by this court, the following principles may be fairly said to be firmly established:

First. Where a contract *necessarily and affirmatively* appears to be void on its face, as an ultra vires act, i. e., a transaction wholly without the scope of the charter powers of the corporation party thereto, then in such case, while the contract remains executory, no action whatsoever can be maintained upon it by either party, and the doctrine of estoppel is not applicable.

Second. Where, under such circumstances, the corporation pays money, or delivers property to the other contracting party, and the latter, thereafter, either *repudiates* the contract, or *refuses* to perform his obligations imposed thereby, then, upon such *repudiation* or *refusal*, the corporation may, under certain circumstances, recover, upon a *quantum valebant*, the value of the benefits received by the other contracting party from it.

Third. Where such *ultra vires* contract is entered into and the other contracting party has, in good faith, fully executed the agreement upon his part, and has never repudiated or attempted to repudiate the contract in any form, the corporation, or its privies, in such case, can not maintain an action, either legal or equitable, to recover the value of moneys or property parted with by the corporation, pursuant to the terms of such contract.

The case at bar falls under the last stated head.

In Penn. Co. vs. St. Louis, etc., Co., 118 U. S., 290, 316-17-18, the court referred to the doctrine under consideration, where, in commenting upon a void contract which had been fully executed by one of the parties thereto, it remarked:

> "The courts will not disturb the possession of such property or compel restitution of money received under such a contract."

In St. Louis, etc., Co. vs. Terre Haute Co., 145 U. S., 393, a bill in equity had been filed by the St. Louis Company, to cancel and set aside a lease or conveyance, which had been made to the Terre Haute Co., of its railroad and franchises for the term of nine hundred and ninety-nine (999) years.

The theory of the bill was that the lease was void, as an *ultra vires* transaction; that the defendant company had received, in tolls and income from the operation of the road, under the lease, sums in excess of twenty-one millions of dollars; that demand had been made for a surrender of the demised premises, and the defendant had refused to comply with such demand.

The bill was dismissed for want of equity, and on appeal this court affirmed the decree. In the course of its opinion, this court stated in the most positive and unequivocal terms,

that the lease was absolutely void as an *ultra vires* conveyance, and, on page 406, remarked:

> "It may therefore be assumed, as contended by the plaintiff, that the contract in question was ultra vires of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law, or in equity, against the other."

The court then proceeds to discuss the question as to the effect of such a contract when executed, saying in this connection:

> "When the parties are in *pari delicto* and the contract has been fully executed on the part of the plaintiff by the conveyance of property, or by the payment of money, *and has not been repudiated by the defendant*, it is now equally well settled that neither a court of law *nor a court of equity* will assist the plaintiff to recover back the property conveyed *or money paid under the contract.* * * * The invalidity of the contract in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant, and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, *and has taken no steps to rescind or repudiate the contract.* Upon this state of facts, for the reasons above stated, plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to

set it aside. * * * This case is not like those in which the defendant, *having abandoned or refused* to perform the unlawful contract, has been held liable to the plaintiff upon an implied contract, for the value of what it had received from him, and had no right to retain. But the case is one in which in the words of Mr. Justice Miller (a case often cited in this opinion) the court will not disturb the possession of the *property that has passed under the contract*, but will refuse to interfere as the matter stands." (Citing several cases.)

Pullman's Palace Car Co. vs. Cen. Transportation Co., 171 U. S., 138.

Facts: The Central Transportation Co., in 1870, demised to the Pullman Co. all its sleeping cars, patent rights pertaining thereto, franchises, etc., for a period of 99 years, for a stipulated annual rental, the lease containing a provision that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

After this contract had been in force for some years, the Pullman Company claimed the right under a provision of the contract to terminate the same, or pay a smaller rent than agreed upon.

This contention of the Pullman Company being denied, suits were brought by the Central Company to recover installment of rent in arrears. In one of such suits the Pullman Company pleaded the illegality of the lease as *ultra vires* the charter of the Central Company, and such plea was upheld in the lower court and sustained by this court, in the case of Central, etc., Co., vs. Pullman's, etc., Co., 139 U. S., 24.

Other suits for the recovery of rent having been instituted by the Central Company, before the question of *ultra vires* had been so adjudged, the Pullman Company filed its bill to restrain the bringing of any more suits for rent.

In such bill the Pullman Company elected to terminate the lease under an alleged provision of that instrument to that effect, and avowed its willingness to pay whatever should be found by the court to be equitable and just, the theory of the latter suit brought by the Pullman Company being based upon the idea that the contract was a nullity.

After various proceedings were had in the lower court, a decree was rendered in favor of the Central Company for a sum in excess of four millions of dollars, on the theory that the allowance of such amount was equitable for the use of the property, after giving credit for the rents which had been in fact paid.

This court, in a lengthy opinion, again announced the doctrine that any recovery which could be permitted in favor of either party for moneys or property which had been received from the other under an *ultra vires* contract, must be upon the theory of a disaffirmance of the contract, and the restoring to the complaining party whatever might be just or equitable under all the circumstances of the case.

The court, however, dissented from the views repeatedly expressed by the lower court, as to the principle upon which compensation should be awarded the lessor company for the use of the property and franchises covered thereby, while the lessee remained in possession and in enjoyment thereof, saying, on page 159:

> "Nor can we accede to the view that the Pullman Company was liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided.

It had the right, while both parties *acquiesced,* to so use the property. There *is no question of trustee in the case.* The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with *any trust,* according to any definition of that term known to us. Although the title did not pass, and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. *So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences,* and no promise to return the property or make compensation is necessary, and none is, therefore, implied. The use of the property was lawful as between the parties so long as the lease was not repudiated by either, and *the rent compensates for the use. After the repudiation the promise is then implied,* and it is fulfilled by the payment of the value of the property at the time the promise is implied, and interest thereon from that time."

It will be observed from this language that the court totally repudiates the idea that the transferring of the property and the subsequent use, improvement and enjoyment thereof under an *ultra vires* lease creates any character of trust relation; that so long as both parties to such agreement carry it out, and neither repudiates any of its terms or provisions, the contract, as between them, is a lawful

one, and no duty, no implication of a promise, no character of a legal or equitable right after the agreement has been fully executed by both sides can or ever will arise to recover money or property which has changed hands as the result of such executed contract.

In short, the *rationale* of the principle announced by this court is to this effect—that so long as one party to an *ultra vires* contract in good faith fulfills and perform all of the obligations which he assumed under such agreement, the other party is not at liberty to repudiate the same, and then claim the right to recover any money or property which he paid or conveyed to the other, upon the theory that any trust relation was created with reference to such money or property growing out of the performance of such contract.

For another case announcing a like principle, see National Bank vs. Stewart, 107 U. S., 676.

For other authorities announcing the like principle, see

Taylor vs. Railroad Company, 4 Woods, C. C., 575.

Long vs. R. R. Co., 91 Ala., 519.

2 Morawetz on Corp. (2d Ed.), sections 721 and 723.

The text of the last cited section reads:

"If, however, the benefit received (under *ultra vires* agreement) is not of such a character as to give rise to a technical debt which could be recovered at *common law*, under and *in debitatus count*, and there is no equitable relation between the parties giving rise to an equitable obligation, the party receiving the benefit can not be compelled to pay for it *unless he agreed to do so.*"

We have already shown by repeated decisions of this court that no equitable relations of any character arise merely by virtue of money or property changing hands under an *ultra vires* agreement, save and except in cases where the party receiving such money or property commits a breach of the provisions of such agreement and refuses to carry out the same or be bound thereby.

See, also, Marvin vs. Anderson, 111 Wis., 387, where the subject is thus pithily stated:

> "The whole trend of modern decisions is against the impeachment of executed corporate transactions, except by punishment of the corporation at the suit of the state."

The application of the principles thus announced to the case at bar are obvious. Lessor Schleier fully executed the contract upon his part by the execution of the lease and the delivery of the demised premises thereunder. He never attempted to repudiate the transaction in any form, and in all respects treated the lease as a valid, binding contract. Hence, no equity arises in favor of the Bank or its creditors, for moneys expended by it in the improvement of the demised premises; and especially is this true in the present instance, when such moneys were not paid out or received by the lessor, but were expended by the Bank for its own uses and with the sole purpose and intent of benefiting itself.

If the lease had not been terminated by mutual agreement and the lessee Bank had continued to promptly pay the rental stipulated in the lease, it goes without saying that the lessor would have no standing in a court of equity, for a cancellation of the lease, or an accounting for profits against the Bank, on the theory that the transaction was *ultra vires*.

If the lessor could not succeed in a court of equity, under such circumstances, upon what permissible theory can the Bank, or its representatives, maintain an equitable suit of any character, when the lessor had fully executed the agreement upon his part and no attempt had been made by him to repudiate the title or interest assumed to be conveyed by the lease?

We will conclude the discussion upon this branch of the case by calling attention to the latest adjudication upon the subject of the status of a creditor of a corporation, touching alleged *ultra vires* transactions of the latter, in the absence of fraud, whether the corporation is solvent or insolvent when the alleged *ultra vires* contract is entered into.

We refer to Force vs. Age-Herald Co. et al., 33 So., 866-68, decided by the Supreme Court of Alabama. On the latter page the court remarked:

> "A creditor can not attack a corporate transaction on the ground that it is *ultra vires merely*, where no fraud is charged. This right is confined to the corporation itself, or where it refuses to account to the stockholder, or, in a proper case, to the state.
>
> "The only ground on which a creditor may assail a corporate transaction in equity, is that its intent or effect is to fraudulently divert or destroy the corporate assets, which are subject to the payment of the corporate debts * * * and this whether the corporation is solvent or insolvent." (Citing O'Bear Jewelry Co. vs. Volver, 106 Ala., 205; and O'Connor Mining Co. vs. Coosa, etc., Co., 95 Ala., 618, is cited to the same effect.)

This court has virtually announced the same principle as thus declared by the Supreme Court of Alabama. In Hollins vs. Briarfield Coal Co., 150 U. S., 371, 385, the court said:

> "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called upon to account for fraud or sometimes mere mismanagement in respect thereto, but as between itself and its creditors, the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor."

XI.

THE MUTUAL RELEASES AND ADJUSTMENTS ENTERED INTO BETWEEN THE LESSOR AND THE LESSEE BANK, WHEREBY ALL CLAIMS AND INTERESTS GROWING OUT OF THE TRANSACTION HERE ASSAILED WERE RESPECTIVELY COMPROMISED AND SETTLED, CONSTITUTED A LAWFUL, BINDING CONTRACT, EVEN THOUGH THE CONSIDERATION THEREOF WAS THE RELEASE OF MUTUAL CLAIMS GROWING OUT OF AND UNDER AN ULTRA VIRES AGREEMENT.

The correctness of this proposition has been directly affirmed by this court in Northern Liberty Market Co. vs. Kelly, 113 U. S., 199, 202, where, inter alia, it was said:

> "If the plaintiff had exceeded its corporate powers in making the original contract, yet it had authority to compromise and settle all claims by or against it under that contract. The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the new note."

For other authorities to the same effect see:

Llano, etc., Co. vs. Pacific, etc., Co., 66 Fed., 526.
Union Bank vs. Geary, 5 Peters, 99.
Sigsworth vs. Coulter, 18 Ill., 204.
Hennessy vs. Bacon, 137 U. S., 78, 85.
White vs. Hoyt, 73 N. Y., 505.
French vs. Shoemaker, 81 U. S., 314.

Under the rule established by these decisions and other authorities which might be cited, settlement and compromise of the then existing claims and demands of the lessor Schleier for the rents and taxes in arrears and the liability of the Bank for future rents, as the same would mature, afforded a valid consideration for the surrender of the unexpired portion of the leasehold term by the Bank, including the Bank building standing upon the demised premises, even though the lease, when executed, was, per se, an *ultra vires* agreement for the reason that the invalidity of the lease could only be authoritatively determined (if at all) after protracted and expensive litigation, and for the further reason that the law favors compromises and settlements rather than litigation.

XII.

THE RELIEF SOUGHT IN THIS SUIT IS INEQUITABLE, AND NO PRECEDENT EXISTS FOR A RECOVERY UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

The books will be searched in vain for a precedent recognizing a right to recover by appellant under the circumstances here appearing of record. In any and every instance where a corporation has been allowed to recover money paid

by it under an *ultra vires* contract, it will be found that each and every of the following underlying conditions existed:

a. That the corporation was absolutely prohibited by law from acquiring title in the given case to the given property, in any manner or to any amount; in short, when there was a total want of power to enter into the transaction to any extent or at all.

b. Where, in legal contemplation, the grantor did not and could not part with his title to the thing attempted to be conveyed, because of the absolute disqualification or want of power on the part of the corporation to take title to any extent or at all.

c. Where the corporation acted with reasonable promptness in suing to recover back moneys paid under such attempted and ineffectual conveyance, and where the right to recover on the part of the corporation would leave the grantor in no worse position than he was in when the corporation parted with its money to him.

Not one of these conditions exists in the case at bar.

Here the attempt is made, through the medium of a court of equity, *not* to recover moneys paid by the Bank to the lessor, but to virtually forfeit the title of the lessor to his own property, in order to create a fund for the payment of the debts of the corporation, solely upon the theory that the Bank voluntarily expended moneys in the construction of a building upon the property of the lessor, when, as it is said, the statute did not vest the corporation with the power to use its moneys in such manner.

Reduced to its last analysis, this is a suit to create and enforce a forfeiture; to judicially impose pains, penalties and punishment upon lessor Schleier, because of his supposed fault in entering into an alleged *ultra vires* lease with the Bank. A forfeiture is attempted to be created and enforced because the court is asked to decree a lien upon and authorize the sale of specific real estate, the fee simple title to which has always been vested in the lessor. In other words, he is to be deprived of specific property, which he never received from the corporation, and a punishment is inflicted to the extent of the deprivation of his title, merely because he consented to become a party to the contract voluntarily entered into by the Bank, and under which the latter thereafter voluntarily expended three times the amount of money in improving the property which was exacted by the terms of the lease. It is now impossible to restore the statu quo.

Grymes vs. Sanders, 93 U. S., 55.

The bill of complaint does not inform the court what the market value of the demised premises was the day the lease was executed, as compared with such market value the day the lease was surrendered, with the bank building then standing thereon. For aught the bill discloses, the value of the naked land covered by the lease at the date of its execution exceeded the value of the same tract, plus the bank building, the day the lease was surrendered. If this be true, then, as a matter of fact, the lessor was not benefited by the expenditure of the money of the Bank in the erection of the building.

It is entirely consistent, therefore, with the averments of the bill, that if the relief asked for were accorded, the lessor would simply lose his title to the whole of the demised prem-

ises, without ever having received one farthing's benefit from the Bank's voluntary expenditures. This is a novel claim, to seriously advance in a court of equity. It is unique and unparalleled.

It is but a trite statement of horn-book law, that courts of equity never enforce penalties or forfeitures or anything savoring thereof, and especially where the attempt in that direction is based upon the abstract proposition of *ultra vires*, a defense or claim that the courts have frequently denounced as odious in its very nature.

Aside from these general principles, there are special reasons in addition why the relief demanded in this suit is beyond the province of a court of equity to grant. These special reasons may be thus summarized:

First: It is settled law that a landlord is never under obligation to pay a tenant for buildings erected by the latter on demised premises, in the absence of a specific, *express* agreement to that effect. No tribunal has enforced this rule more stringently than this court.

Kutter vs. Smith, 2 Wall., 491.
Kinkead vs. U. S., 150 U. S., 483.

Second: Equity never entertains jurisdiction at the suit of a lessee or other party *out of possession*, to recover the value of improvements erected upon the demised premises by such lessee, wholly regardless of the circumstances under which such improvements were made. Equitable relief in such cases is exclusively confined to instances where the owner of land is *complainant* in a court of equity, seeking some relief against the lessee or other person who erected the improvements, and then only agreeable to the maxim, that "He who seeks equity must do equity."

For authorities announcing and elaborating this principle, see:

Dawson vs. Grow, 29 W. Va., 335, et seq.

Williams vs. Vanderbilt, 145 Ill., 251.

Second Jones on Liens, section 1136.

Putnam vs. Ritchie, 6 Paige, 390, 405.

3 Pom., Eq., section 1241; also note 2, same section.

Young vs. Pate, 3 J. J. Marshall (Ky.), 100.

For an interesting case, where this court in effect accepted the principle here contended for, see Litchfield vs. Ballou, 114 U. S., 190. The facts therein were as follows: The defendant city had obtained a large amount of claimant's money, upon an issue of *ultra vires* bonds, and had invested such moneys, with other funds, in the construction of a water works plant, and the attempt was made to establish a lien and impress a trust upon such works in favor of the plaintiff, for the purpose of thus enabling the plaintiff to recover the moneys received by the city under the *ultra vires* contract, and which contract had been expressly repudiated by the city. This court directed the dismissal of the bill, distinctly holding that the specific property, in part created by the funds of the plaintiff, could not be impressed with a trust in his favor, and that the relief sought was without the province of a court of equity to grant.

See, also:

Aiken vs. Suttle, 4 B. J. Lea (Tenn.), 103.

It will be found, upon examination of these authorities and other cases referred to therein, that it is an inflexible rule in a court of equity that a party *complainant* can never

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obtain affirmative relief by way of reimbursement for moneys expended in the improvement of the lands of the defendant, lessor, vendor, mortgagor, or otherwise. The claim for reimbursement, in any and all of such cases, regardless of its abstract justice or equity, can only be employed in a court of equity as a shield, by way of defense, and not as a weapon of attack.

In a case like the one at bar, where the lessee Bank had full notice and knowledge of every material fact at the time the lease was entered into and improvements erected and paid for, and fully and thoroughly understood its legal rights and status in connection with the erection of such improvements, and where the landlord was not guilty of any *fraudulent* conduct in fact, we assert, with absolute confidence in the accuracy of our statement, that not a case can be found in the books to countenance the right of any one, whether occupying the position of creditor or otherwise, to compel the lessor to pay for the cost or value of such improvements.

The case was rightfully disposed of, therefore, in all of the lower courts, upon the ground, if no other, that a court of equity will never grant the particular relief specifically prayed for in the present instance.

XIII.

THE SURRENDER OF THE LEASE AND BUILDING DID NOT AMOUNT TO AN ILLEGAL PREFERENCE TO APPELLEE SCHLEIER, AS A CREDITOR, IN CONTRAVENTION OF THE NATIONAL BANKING ACT.

The question whether the surrender of the lease and building does, or does not, constitute an illegal preference by the appellee Bank, as an insolvent institution, is not properly

presented by the bill of complaint, for the reason that the prayer for relief does not ask for a restoration of the leasehold interest, charged with its obligations and liabilities, and a redelivery of the demised property and the building to the appellant receiver. On the contrary, the specific prayer for relief is that the original lease itself shall be declared cancelled and held for naught, as a void and *ultra vires* instrument.

The prayer is not based upon the theory that the sole creditor represented by the receiver was, in any respect, injured by the mutual releases and settlement between the appellees, but that the alleged and sole injury sustained by such creditor was the fact that the Bank originally parted with three hundred and five thousand dollars ($305,000) of its assets in the improvement of the property of the lessor, such expenditure being made, as contended, without authority of law.

It is not charged or pretended that the leasehold interest, including the bank building, subject to the obligation to pay rent, taxes and other fixed charges, possessed any marketable or assignable value whatsoever at the time of the surrender of the lease. In other words, it is not attempted to be charged that the Bank parted with anything of value to its creditors, by the final settlement entered into with the lessor in October, 1897.

The logic of the appellant's contention must necessarily be, that the appellant receiver could successfully maintain the present action, and obtain a decree for the lien and accounting prayed for, *even though no formal surrender of the lease had ever been made.*

It affirmatively appears, from the statements contained in the bill, that the officers and stockholders of the Bank regarded the leasehold interest, at the time of its surrender, as a burden, rather than a benefit; that the income from the

building in its then condition, was not sufficient to pay the fixed charges created by the lease.

The stockholders and officers of the Bank, moreover, were the moving parties in the effort to induce the lessor to accept the surrender of the demised premises and the building thereon, in consideration of a release of the Bank for rent and other charges in arrears, and for all future liability upon subsequent accruing rent. There was no concealment of the purpose and desire of the Bank in that behalf. Repeated public notices were given to the stockholders of the Bank, as well as the world at large, that the officers of the Bank were desirous of relieving it from the further burden of paying the charges required by the lease, and that, as a sound business proposition, it was highly desirable in the *then* condition of the property, that the lessor might be induced to accept a surrender and cancellation of the lease, in exchange for the release of the Bank upon past, as well as future, obligations thereunder.

The sole existing creditor of the Bank was, therefore, in nowise injured or prejudiced by a surrender and cancellation of the lease, and hence the transaction did not come within either the letter or the spirit of the provisions of the national banking act, relative to illegal preferences by an insolvent banking institution.

Moreover, the lessor was a secured creditor, in legal contemplation in reference to the covenants of the lease for the payment of the rent, because no other creditor of the Bank could acquire the Bank's interest in the lease or building without complying with the obligation to pay the rentals, which, by operation of law, became a lien or first charge upon the property.

Aside from this, however, the allegations of the bill of complaint fail to show any violation by the Bank with reference to a supposed illegal preference in favor of the lessor,

were it conceded that he occupied the position, simply, of a general, unsecured creditor.

The bill does not charge that the surrender of the lease was made with a view of preventing the application of the Bank's assets as prescribed by law, nor does it charge that it was made "with a view to the preference" of one creditor to another. Averments to that effect are essential in order to disclose an illegal preference within the contemplation of the statute.

Sec. 5242, Rev. Stat. U. S.
Scott vs. Armstrong, 146 U. S., 499.
McDonald vs. Bank, 147 U. S., 397.

The bill, moreover, fails to charge that the officers of the Bank knew of its insolvency at the time of the surrender of the lease. This fact should also be averred.

See
McDonald vs. Bank, supra.

Again, there are no averments of fact contained in the bill which make out a *prima facie* case of the insolvency of the Bank at any time prior to the 20th day of December, A. D. 1899, when the comptroller of the currency placed the Bank and its assets in the hands of a receiver on the ground of insolvency.

The bill merely charges, as a legal conclusion, and then only upon information and belief, that from the *21st day of August, A. D. 1893*, down to the *20th day of December, A. D. 1899*, or practically six years and a half, the Bank continued to be insolvent; but the pleading at the same time affirmatively discloses that the Bank was a going, active concern, doing business as a national banking institution during the

whole of the six years and a half that the pleader asserts he is informed and believes the institution was insolvent.

Will this court presume, in the face of these admitted facts, that the comptroller of the currency was so careless or indifferent to the discharge of his official duties, that he would permit an insolvent bank to continue to do business, receive deposits and carry on a general banking business for over six years, when during every day of that time the concern was insolvent? The supposition is preposterous.

It has been repeatedly held that mere general allegation of insolvency, without averring the facts and circumstances, showing that such condition exists, is tantamount to the statement of a mere legal conclusion, and in such case the demurrer does not admit the supposed insolvency.

See

Atlantic Trust Co. vs. Consolidated, etc., Co., 49 N. J. Eq., 402.

New Foundland, etc., Co. vs. Schack, 40 N. J. Eq., 222.

If the naked, general charge of insolvency is eliminated from the bill, there are no facts appearing therein which would even suggest that the Bank was, in any manner, financially embarrassed, prior to or at the time of the surrender of the lease and the execution of the mutual releases of the parties thereto. In short, a comparison of the averments of the bill with the provisions of section 5242, Rev. Stat., will disclose that there is hardly an effort made to state a case which would bring the surrender of the lease within either the letter or spirit of that section.

For a comprehensive summary of the vital defects in the appellant's bill, in failing to state any of the essential facts requisite to the setting forth of a case of illegal preference,

in contravention of the national banking act, see the concluding portion of the opinion of the Court of Appeals in this case, set out on page 111 of the transcript of record herein.

The *resume* there contained clearly and concisely points out the radical insufficiency of the bill in that behalf.

XIV.

THE BILL OF COMPLAINT SHOWS THAT THE PEOPLES SAVINGS BANK (THE ONLY CREDITOR OF THE NATIONAL BANK), WHICH THE APPELLANT REPRESENTS IN THIS ACTION, AND THE COMPTROLLER, HAVE BEEN GUILTY OF LACHES.

This is true because the original bill, filed December 22, 1900, shows that the National Bank was, between July 19th and August 21, 1893, in the hands of the comptroller, through his receiver, J. B. Lazear, during which time the comptroller did not attack the validity of the lease. It also shows that the stockholders and creditors of the National Bank allowed the said Lazear, receiver, to be discharged, and the property of the Bank (which necessarily included the lease and building) to be returned to the National Bank. The allegations of the bill further show that in 1897, *public notice was given for several months of the intention of the National Bank to turn over the building to Mr. Schleier*, and fails to allege that any protest was made by any stockholder or creditor of the National Bank. The complaint also shows that the *lease* between Mr. Schleier and the National Bank was *duly recorded.* The court will also take judicial notice of the law which requires national banks, not less than five times each year, to report to the comptroller, and to publish, in the place where they do business, statements showing their resources and liabilities.

That the question of laches can be raised in the federal court by demurrer, is clearly settled by several decisions of this court.

Landsdale vs. Smith, 106 U. S., 391, 393.
Speidel vs. Henrici, 120 U. S., 377, 387.
National Bank vs. Carpenter, 101 U. S., 567, 568.
Bryan vs. Kales, 134 U. S., 126, 135.

Therefore, even if the Savings Bank, which the appellant represents, was, at the time the lease was made and the building constructed, and at the time the same were surrendered, a creditor of the National Bank, it stands guilty, by the allegations of the bill, with laches, both by reason of unexplained delay in commencing this suit and its failure in any manner to object to the validity of the lease for more than ten years, it being chargeable with notice of all the matters complained of during such period prior to the institution of this suit. If, on the other hand, the Savings Bank was not a creditor at the time the lease was made and the building was constructed, then, as already pointed out, it, as such, can not complain of and ask relief against either of such transactions.

XV.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO ALLOW THE PLAINTIFF TO FILE HIS AMENDED BILL TENDERED SUBSEQUENT TO THE RENDITION AND ENTRY OF FINAL DECREE.

The complainant amended his original bill after the filing of the demurrer thereto and before argument thereon. (Record, page 35, et seq.) The second amended bill, the refusal of leave to file which is assigned for error, was not tendered until more than a month after the dismissal of the

original bill, as amended, and not until sixty days after the demurrers to the first amended bill were argued and submitted. (Transcript, pages 42-3-8.) It was, at most, a matter resting wholly in the discretion of the trial court, under these circumstances, to allow or refuse the filing of such amended bill, and the refusal of the court in that behalf will not now be reviewed.

National Bank vs. Carpenter, 101 U. S., 567, 568.

U. S. vs. Atherton, 102 U. S., 372, 375.

Chapman vs. Barney, 129 U. S., 677-681.

Bullitt Co. vs. Washer, 130 U. S., 142, 145.

Central Trust Co. vs. Grant, etc., 135 U. S., 207, 226.

Gormley vs. Bunyan, 138 U. S., 623, 630, 631.

The demurrers to the original bill, as amended, were argued at length by respective counsel, *three* days being devoted to that purpose (Transcript, pages 42-3), and the demurrers were finally submitted to the consideration of the Circuit Court on December 4, 1901 (Transcript, page 43).

Twenty-six days thereafter elapsed before the court ruled upon the demurrers (Transcript, page 43), and during this period no effort was made to either draft an amended bill or apply for leave to file any additional pleading.

During all this time appellant's counsel were fully advised of all the defects in the then amended bill, relied upon by appellee, and appellant deliberately and advisedly took his chances upon the ruling of the court relative to such defects.

Will a litigant be permitted to thus experiment upon the outcome of a judicial decision, and, in the event of an adverse holding, be then allowed an amendment, when, from the beginning of the suit, he had full knowledge of all the alleged

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omitted facts, which the court eventually rules should have been set forth in his original bill? We submit that diligence, *good faith and proper practice* require an answer in the negative.

It has been repeatedly decided that, where an amendment is permissible, the complainant must promptly make application in that behalf at the earliest moment after he becomes aware of the defects in his bill.

Thus, in Professor Fletcher's recent work on Equity Pleading and Practice, section 402, the rule is expressed:

> "A complainant, wishing to amend his bill, must take the first opportunity, after being made acquainted with the defects in it, to ask leave to do so."

But we go farther, and insist that, at the stage of the case when the proposed second amended bill was tendered for filing, the Circuit Court was then without lawful power to receive the pleading or allow it to be filed for any purpose. The equity rules of this court, on the subject of amendment of bills (rules 28, 29, 30 and 35), expressly contemplate that the amendment shall be applied for and allowed, if at all, *before* the rendition or entry of a final decree.

The privilege of applying for or allowing amendments *after* final decree is nowhere recognized by such rules. As early as 1842 the 90th equity rule was promulgated, which, in effect, declares that the practice of the Circuit Court shall be regulated by the practice of the high Court of Chancery in England, where the rules adopted by the Circuit or Supreme Court do not control.

Under the operation of this rule, upon the allowance of a demurrer to a whole bill, the case was out of court, and no proceeding could be subsequently taken therein.

1st Daniels' Chancery Pl. and Pr. (Perkins, 3d Am. Ed.), pages 424 and 624.

Whether this rule would now be enforcible in all its strictness upon the mere sustaining of a demurrer to the entire bill may possibly admit of some question, in view of the remarks of this court in Bank vs. Carpenter, *supra*. But it seems to us clear that if, in addition to sustaining the demurrer, the court renders and enters a final decree, absolutely dismissing the bill, as was done in the present instance, it is too late thereafter to apply for an amendment.

We submit that proper practice requires that when the opinion of the court is announced, sustaining a demurrer to the entire bill, the plaintiff should *then and there, in open court*, before the entering of the decree, make a proper application for leave to amend, and when this is not done a motion in that behalf should not thereafter be entertained, and the evidence of such application should appear from the record entries and not by an *ex parte* affidavit.

The transcript of record in this case discloses (page 43) that on the 30th of December, 1901, the final decree of the Circuit Court was rendered and entered, and the decree then enrolled, unconditionally dismissing the bill of complaint at complainant's cost, without any application having been then made to the court, in any form, by matter of record, for leave to amend the original bill as first amended.

The motion to file the amended bill under consideration was not presented to or filed in court until February 1, 1902, more than 30 days after the enrolling of the final decree. We respectfully submit that the Circuit Court was then without jurisdiction to entertain such motion.

In Fletcher on Equity Pleading and Practice, section 402, it is, *inter alia*, said:

> "Leave to amend a bill, after dismissal thereof, is error."

Citing numerous cases in support of the rule thus announced.

If, perchance, we are in error in the assumption that the application for leave to file the amended bill was interposed too late, then we insist that a proper showing was not made why the proposed amendments were not incorporated in the original bill.

Equity rule 29 provides that, where application to amend the bill is made after the filing of a replication, such amendment shall not be allowed (italics ours)

> "except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of *vexation* or *delay*, or that the matter of the proposed amendment is material, and *could not*, with *reasonable diligence*, have been sooner introduced into the bill."

Certain it is, that the spirit of this rule should be observed where the unusual, if not unprecedented, application is made more than a month succeeding the rendition and entry of final decree dismissing the bill.

An examination of the verified motion of complainant to file such amended bill (Transcript of Record, pages 44-48) will disclose that neither of the indispensable requisites prescribed by the rule last referred to were complied with. Nowhere in such motion or verification is it stated that the

amendment "is not made for the purpose of *vexation* or *delay*," neither are there any facts stated which disclose that, in the exercise of reasonable diligence, the alleged facts set out in the amended bill could not have been incorporated in the original bill. The only attempt made in the latter behalf is a statement upon the part of counsel virtually to the effect that he was ignorant of the law as declared by the Circuit Court in the opinion sustaining the demurrer, viz., that a subsequent creditor could not be heard to raise the question of the alleged *ultra vires* character of the transaction assailed, and that the bill should affirmatively disclose that the creditor for whose benefit the suit was prosecuted was such creditor when the matters complained of occurred, *even were it conceded* that such existing creditor or his representative could successfully maintain the suit.

We deem it unnecessary to argue the proposition that the inattention or inadvertence of counsel, with reference to legal requirements touching the essential elements of a bill in equity, afford no ground for granting the relief in question, where the *facts* sought to be incorporated in the amended bill were known, or, in the exercise of ordinary diligence, should have been known to both client and counsel when the original pleading was framed, and full knowledge of such alleged *facts* when the original bill was drafted, is nowhere denied.

Moreover, in strictness, rule 29 requires that the excusatory facts should themselves be incorporated in an affidavit, separate and distinct from the motion for leave to file the amended bill, and this was not done in the present instance.

In this connection, we may further remark that *if* the alleged error of the Circuit Court, in refusing to allow such second amended bill to be filed, was *properly presented* for the consideration of the Circuit Court of Appeals, the latter court evidently deemed the point to be so devoid of merit

that *it did not deign to notice it in the opinion it handed down,* confirming the decree of the Circuit Court.

We desire to also call attention to the fact that Spencer, the assignee of the People's Savings Bank, and the only creditor whom the receiver (appellant) herein represents, according to the allegations of the original bill, had been engaged in litigating with the appellee National Bank since 1897, and it was the clear duty of such assignee to advise the appellant (receiver) of all facts of which in the exercise of ordinary diligence he could have informed himself during that time, and before the filing of the original bill.

Again, it is evident from the foregoing statements that the second amended bill was not tendered until long after the next succeeding rule day following the entry of the decree of dismissal, and equity rule 30 of this court, in express terms, requires that any amendment allowed shall be filed on or before the next succeeding rule day, and a failure so to do shall be deemed an abandonment of the privilege of amending, even if such privilege had been formally granted. This, alone, is fatal to the application under consideration. For authorities upon this question, see:

Boston, etc., Co. vs. Parr, 98 Fed., 483-4.

Foster's Fed. Pr. (3d Ed.), section 160.

Claflin vs. Bennett, 51 Fed., 693, 702, affirmed in 57 Fed., 257.

We have already called the attention of the court to the fact that plaintiff was allowed to amend his original bill after demurrer filed thereto by defendants, and this amendment was evidently prepared with great care and covers several pages of the transcript of record. (See pages 35-41, Transcript.)

Having been thus once granted the privilege of amendment in compliance with the equity rule, any further application in that behalf, especially after the rendition of final decree dismissing the bill, was a matter resting solely in the discretion of the Circuit Court, and can not be here properly assigned as ground of reversal, even conceding that power existed in the Circuit Court to allow such amendment, the correctness of which concession we dispute.

XVI.

THE PROPOSED AMENDED BILL DID NOT CURE THE VITAL DEFECTS IN THE ORIGINAL PLEADING.

A. In the attempt to avoid the effect of the opinion rendered by the Circuit Court in dismissing appellant's bill, the effort was made to enlarge the averments of the original bill, touching the date when the appellee National Bank first became insolvent, but it will be found, on examination of the allegations in the proposed amendment, that such alleged insolvency is not charged to exist either at the time of making the lease or the payment of moneys for the construction of a bank building. (Abstract, page 64.)

B. Upon the main proposition relied on by appellant, viz., that the outlay of the moneys of the National Bank in the construction of the building upon the demised premises constituted an illegal expenditure of corporate funds, in that such expenditure exceeded the amount of the capitalization of the Bank, the averments of the amended bill in that behalf weakened, rather than strengthened, appellant's case.

The allegations of the amended bill, page 50, subdivision 5 (Transcript of Record), read:

> "That at all times thereafter (July 1, 1889), hereinafter mentioned, down to and including and

> *for some time after* the date of the execution of the alleged pretended contract of lease * * * the said total aggregate amount of the entire share capital remained and continued unchanged, and during all said time was for the said same amount of $300,000, as aforesaid."

Stated concisely, these averments charge that the original capitalization of the Bank remained unchanged, without increase, from the time of the organization of the Bank to the date of the execution of the lease, and "*for some time*" thereafter.

This form of statement is an apt illustration of the familiar vice in a pleading, characterized by the books as a negative pregnant, and which is defined as

> "the statement of a negative proposition in such a form as may imply or carry with it admission of an affirmative."
>
> Anderson's Law Dictionary, title, "Negative Pregnant."

The pleader, by the proposed amended bill, charges, that the original capital of the Bank was not increased before the execution of the lease, or for "some time" thereafter.

The phrase "some time" is of the most vague and indeterminate nature. It is consistent with the idea that the capitalization of the Bank may have been increased on the following day succeeding the execution of the lease, and that proceedings looking to such increase may have been pending and substantially completed at the date the lease became operative.

When the amended bill attempts to charge that the capital of the Bank was not increased prior to a given date, it

is tantamount to a tacit admission, under the rule of pleading adverted to, that the capital of the Bank was, in fact, thereafter duly increased, pursuant to law, and to any amount which the statutes permitted.

Elsewhere in this brief we have pointed out that the law allows the capital of a national bank to be increased to any sum which the comptroller of the currency may approve of, and the provisions of the national banking act, limiting the amount of indebtedness which a banking association may lawfully incur, is predicated upon the capital of the bank as it may exist at the time of the incurring of the indebtedness, and not upon the capitalization originally fixed by its charter.

Accepting, therefore, the tacit admission that the original capitalization of the Bank was at some time, subsequent to the execution of the lease, lawfully increased, without any attempt being made to advise the court touching the extent to which such capital was enlarged, we might safely concede, for the sake of argument, that the validity of the lease was open to question at the time of its execution, upon the theory relied on by appellant, and yet, if during the existence of the demised term, the capital of the Bank was duly increased, pursuant to the statute in that behalf, and after such increase, both the lessee Bank and the lessor treated and recognized the lease as an existing valid instrument of conveyance, and the covenants and obligations thereof operative and binding upon both parties thereto, then, upon the principle of adoption, if not of technical ratification, the original invalidity, if any, of that instrument, would, by legal operation, become cured, and no one could be thereafter heard to assail its binding effect because of the conditions existing when the same was originally entered into.

When the lease was executed, it was then within the potential power of the banking corporation (lessee) to invoke into active life, by proper proceedings thereafter, the right to increase the capitalization of the Bank to any amount necessary to give full validity to that instrument, and where this is the case the subsequent exercise of such potential power renders the contract in question unassailable.

In Angell & Ames on Corp. (10th Ed.), section 304, the text, *inter alia*, reads:

> "A railway company, not authorized to make a particular contract, having, in contemplation of an extension of their powers, authorized an agent to contract for them, may, upon obtaining the requisite powers, ratify, by taking advantage of or acting upon his contract, even though, at the time the contract was made, it was illegal and void."

This court, in Whitney vs. Wyman, 101 U. S., 392-6-7, affirmed the doctrine thus stated, in answering the objection that the corporation (whose contract was there in question) was not authorized to enter into such contract at the time of its execution, as follows:

> "The corporation subsequently ratified the contract, by recognizing and treating it as valid. *This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into.*"

Citing

Angell & Ames on Corp., section 304.

To the same effect see:

White Water, etc., Co. vs. Vallette, 21 How. (U. S.), 414.

Carr vs. La. Natl. Bank, 29 La. Ann., 258-9.

By virtue, therefore, of the tacit admission contained in the plaintiff's amended bill, it is clear that for many years prior to the final cancellation of the lease, such instrument and each of its terms and provisions were in all respects valid, lawful and binding, by reason of the parties thereto having continuously and consistently acted thereon and recognized the same to be in full force and effect; even though it should be conceded, as an extreme proposition, that the instrument when executed was then subject to attack on the theory of an absence of power at that time upon the part of the National Bank to become a party thereto; it inferentially appearing that during the years while the lease was so mutually recognized and acted upon, the defendant Bank possessed full power and lawful authority to enter into a contract of that character.

C. Such amendment does not disclose that the Savings Bank (whom appellant solely represents) became a creditor of the National Bank prior to the making of the lease in controversy. On the contrary such amendment alleges

> "that the said depositors of said Savings Bank and said Savings Bank *became* and were, during all the said times *subsequent to the making of the alleged lease*, and still are, the creditors of said defendant National Bank."
>
> Transcript, page 83, folio 123.

If it should be urged that by the allegations of the proposed amendment, to be found on pages 74-6 (Transcript),

the appellant intended to aver that the indebtedness represented by the judgment recovered by the assignee of the Savings Bank on November 30, 1899, and to collect which judgment was the specific object of this suit, was in existence when the lease was made, then such averments wholly fail to make out a case in that behalf.

The most that can be said of the allegations under consideration is that the Savings Bank was a depositor in the appellee National Bank, prior to and at the time of the making of the lease, and continued to do business thereafter as such depositor, down to the time when suit was brought by the Savings Bank against the National Bank in 1897. But for aught that appears in any statement contained in the proposed amended bill, every dollar of the indebtedness forming the basis of the judgment referred to was contracted long after the execution of the lease, the construction of the bank building and the payment therefor in full.

Merely averring a current course of business between the Savings Bank and the National Bank, commencing in 1889, and extending to 1897, is not tantamount to an allegation that any indebtedness contracted during 1889 or 1890 by the National Bank to the Savings Bank had not been fully paid, long prior to the institution of the suit in 1897.

Moreover, if by any latitude of construction of the allegations of the second amended bill, contained on pages 74-6 (Transcript), it could be said that it was there intended to charge that the indebtedness represented by such judgment was incurred, either in whole or in part, prior to the making of the lease, then such allegations would be absolutely contradictory to the other averments of the amended bill, wherein it is alleged that the indebtedness to the Savings Bank *accrued subsequent* to the making of the lease. (Transcript, page 83, folio 123, and pages 64-5, folios 92-3.)

D. A new and independent theory of recovery is sought to be set up by the second amended bill, in that it is attempted to be there charged that the Savings Bank gave credit to the National Bank, upon the supposition that the National Bank was the owner of the building constructed on the leased ground; that the alleged belief of the Savings Bank in the premises was based upon the alleged assertion of ownership by said National Bank of said building; such allegation of ownership being in the form of public assertions by the National Bank that the said bank building was a part and parcel of the resources and assets of said Bank, coupled with the additional averments that the appellee Schleier carelessly failed and neglected to give any notice to the said Savings Bank, or to the depositors or creditors of the National Bank, of his claims to ownership of said bank building, and that said Schleier failed to give such notice, although he knew that the said National Bank was publicly asserting such character of claim.

In view of the fact that all of the rights and interests of the appellee Schleier, in connection with such bank building, were fully and specifically set forth and contained in a matter of public record, to wit, the spreading at large of the lease in controversy upon the records of the county of Arapahoe, wherein the demised premises and building were situate, and further that it is not claimed or pretended that he in any manner participated in the making or causing to be made such alleged claims of ownership of said building by said Bank, we submit that the question of the effect of such assertions of ownership by the latter, as affording any basis for the invoking of the doctrine of estoppel against appellee Schleier, is fully and finally set at rest by the decision of this court, in Wiser et al. vs. Lawler et al., decided April 27, 1903, reported in 189 U. S., 260, *et seq.*

In that case the owners of certain mining property had entered into a contract of sale thereof, pursuant to the terms of certain escrow agreements between them and the purchaser, the contract of purchase providing that the purchaser should take possession of the property, develop and operate it, and apply the proceeds to the payment of the purchase price; the contract further providing that all improvements made upon the property, or ore taken therefrom, should belong to the vendors in the event of default being made in the payment of any of the installments of the purchase price when the same should mature.

It does not appear from the statement of the case that the escrow agreements or contract of purchase were placed of record, but it did appear from the public records that the legal title to the property was vested in the vendors. After the execution of the contract of purchase, the vendee took possession of the property and caused certain corporations to be organized, and with the view of effecting sales of stock in such companies, the vendees caused printed prospectuses to be published and broadly circulated, the terms of which were calculated and designed to lead prospective purchasers of stock to believe that such corporation was the legal owner of all the mining property in question. Large purchases of the stock were made, based upon such false representation, and the attempt was made to thereafter hold the vendors liable on the theory, that with knowledge of the existence and circulation of such prospectuses, they were estopped to deny the truth thereof.

In utterly repudiating the doctrine of estoppel, under such circumstances, this court, *inter alia*, said:

> "There were no relations between them (vendors) and the purchasers of the capital stock, and

no duty on their part to interfere with the circulation and distribution of the prospectuses and maps, or to inform the subscribers personally that they were the owners of the legal title to the property. They had the right to rely, so far as respected these companies and their stockholders, upon the fact that their title was of record, and was notice of their rights to everyone who contemplated taking stock in the company." * * *

"But conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part." * * *

"But conceding that they (vendors) were fully apprised of their (prospectuses) contents, what action were they bound to have taken. They could not have given notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names and addresses. A notice to the company not to send out these prospectuses would have been equally futile, in case the directors chose to disregard it, since they could not control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters."

The legal principles so aptly expressed are directly *apropós* to the question in hand. The original fee simple title of appellee Schleier to the demised premises is expressly admitted. The respective rights and interest of the appellee and the Bank to the bank building were also matters of record by the recording of the lease in question. Even if appellee Schleier was advised of the fact (while the public records fully disclosed the respective rights and interests of himself and the Bank in the premises) that the Bank's officers were making public assertions and representations of ownership of such building, he was under no legal or equitable obligation to inquire of the Bank the names and addresses of the hundreds, and possibly thousands, of its depositors and creditors, so that he might be in a position to send out circular letters to such creditors and depositors, that the Bank's alleged assertion of ownership was, in fact, unfounded.

It is not charged or pretended in the amended bill that defendant Schleier knew the extent or character of indebtedness which, from time to time, was being contracted or incurred on the part of the National Bank to the Savings Bank, or that he knew that such Savings Bank was being in any manner prejudiced by such alleged representations, or that it in any manner relied thereon, or was being misled thereby, or that it occupied any relation to the National Bank other or different than was the case with reference to the latter's multitude of other depositors or creditors.

In short, under the decision last referred to, so long as the appellee Schleier took no active part in aiding or abetting the Bank in making such alleged public misrepresentations, his mere silence, even though coupled with contemporaneous knowledge of the making of such representations, would afford no ground or basis for action against him, either at

law or in equity, upon the part of any of the depositors or creditors of the National Bank.

Again, it would be highly inequitable in the present case, from the averments contained in the amended bill, to draw the conclusion that the officers of the National Bank did, in point of fact, perpetrate a wrong or fraud upon any person in connection with such alleged representations. The Bank officers knew that the lease in controversy was a matter of public record. Under the terms of such lease the Bank and its assignees would remain, for a period of ninety-nine years, in a qualified sense, the owners of said bank building, *so long as all the covenants of the lease on their part to be performed, were fully met.*

Hence, in a loose, general sense, the Bank might be said to be the owner of the building, so long as the lease remained operative and in force, and it was doubtless in this sense, and in this only, if at all, that the pretended representations of the Bank were ever made. However this may be, the fault or wrong, if any, of the Bank, in the premises, is in nowise chargeable to appellee Schleier, who is virtually the sole defendant in this suit.

As we have already observed, the theory of estoppel was advanced by the appellant for the first time in the amended bill under consideration, more than a month after the original bill had been dismissed for want of equity. It is, therefore, a plain attempt to shift the ground upon which the suit was originally begun, and to advance a new and independent theory from that originally taken in the bill before the court at the time of its dismissal.

The theory of estoppel first advanced by the amended bill necessarily presupposes an admission that defendant Schleier possessed lawful ultimate title to the bank building, but that in equity he ought not to be allowed to assert and

establish such valid title, because of alleged matters in the nature of estoppel *in pais.*

On the other hand, the theory of the original bill was that the appellee never possessed any character of lawful title, either legal or equitable, to the bank building, or, at least, that he was accountable, in equity, for the full value or cost thereof to the creditors of the Bank, because the contract under which said building was erected was *ultra vires.*

But the most conclusive answer to the theory of the amended bill is the fact that the relief prayed for therein utterly ignores the idea of an estoppel as affording any ground upon which appellee Schleier should be held accountable.

The prayer in the amended bill is substantially identical with that in the original bill, and asks the court for a decree, annulling both the original lease and the surrender thereof, solely upon the ground that the transactions represented thereby respectively were *ultra vires*, and no relief whatever is asked upon the ground that the appellee should be adjudged estopped in any manner by virtue of any matter or thing arising subsequent to the execution of such lease.

Much more might be appropriately said and urged in support of the proposition that the amended bill in nowise aided the theory upon which relief was sought, or had the effect to cure the vital defects in the original bill, but we believe enough has been said in that behalf.

Should the question be here raised, or the thought arise in the mind of the court, whether under the statutes of Colorado a written lease of realty for a term of years is an instrument authorized thereby to be made a matter of public record, we will set the subject at rest by reference to provisions of such statutes in that behalf.

Section 446, chapter 29, Mills' Ann. Stat. of Colo., relating to conveyances and the recording thereof, *inter alia*, reads:

> "All deeds, conveyances, agreements in writing of or affecting title to real estate, or *any interest therein*, and powers of attorney for the conveyance of any real estate, or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such offices * * * such deeds * * * * * and agreements in writing shall take effect as to subsequent *bona fide* purchasers and encumbrances by mortgage, judgment, or otherwise, not having notice thereof."

Section 456 of the same chapter reads:

> "The terms 'land' and 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with the terms 'lands, tenements and hereditaments,' and as embracing all mining claims and other claims and *chattels real*. The term 'deed' includes mortgages, *leases*, releases, and every conveyance or encumbrance under seal."

And section 833, 1 Mills' Ann. (Colo.) Stats., *inter alia*, reads:

> "He (county clerk and recorder) *shall* also record or cause to be recorded in print, or in plain and distinct handwriting, in suitable books to be provided and kept in his office, all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office."

And the Supreme Court of Colorado, in McKee vs. Howe, 17 Colo., 538-541, in speaking of the effect of these various statutory enactments, remarked:

> "In this state, by sundry statutes, interests in land, such as chattels real, *leases* for a term of years, and the like, are regarded as real estate, instead of personalty."

Reference is then made to another section of the Colorado statutes there cited, which reads:

> "The word 'land' or 'lands,' and the words 'real estate,' shall be construed to include lands, tenements and hereditaments, and all rights thereto, and *all interests therein*."
>
> General Stats., section 4132; 2 Mills' Ann. Stats., section 4185."

The court then adds:

> "A lease of land for a term of years is certainly an interest in lands."

The court there applied these various statutory provisions by holding that where an intestate died, possessed of an unexpired leasehold interest in lands for a term of years, such unexpired term descended to and vested in the heirs of the deceased, and not in his administrator.

It is, of course, familiar law, that the character of title or interest acquired by the National Bank to the demised premises, under the lease in controversy, is to be measured and controlled by the laws of the state where such land is situate; and, under such laws as we have pointed out, a written lease for a term of years is regarded as a conveyance

of an estate or interest in realty, and is admissible to public record with the same force and effect, as constructive notice of its contents, as would be the case of a deed conveying the fee simple title.

It was urged in the Court of Appeals, and the point may be again pressed here, that *simple* creditors are not affected by the recording statute of Colorado, notwithstanding the act, in express terms, declares that creditors, *by* "*judgment* or *otherwise*," are bound thereby.

Section 446, Mills' Colo. Stats., *supra*.

Two Colorado cases are cited in support of this somewhat remarkable contention. The first is the early case of Gillett et al. vs. Gaffney et al., 3 Colo., 351-366. No question in anywise similar to the one under consideration was there involved. The facts of the case disclose that all that the court was called upon or intended to decide was, that the recording of a deed, executed by one co-tenant, designed to have the effect of a repudiation of the co-tenancy, would not, *per se*, start the statute of limitations running in favor of the grantee in such deed, as against the co-tenant who is sought to be ousted. That a judicial holding, under such a state of facts, can not be availed of in the case at bar, is too clear to admit of argument.

The other Colorado case was not decided by the court of last resort, but by an intermediate appellate court, to wit, the Court of Appeals.

The case relied on is Rose vs. Dunklee, 12 Colo. App., 403-14-15. All that was decided in that case was, that where a judgment debtor had executed and caused to be recorded a deed, the expressed consideration of which was $1, such statement of consideration would not, *per se*, suffice to start the statute of limitations running as against the judgment creditor who subsequently attacked the deed on the

ground that the same was a voluntary conveyance, made with the intent to delay, hinder and defraud creditors.

That this is all the court intended to hold is evident from the language appearing on page 415, *supra*, where it is said (italics ours):

> "To charge him (judgment creditor) with notice of the voluntary character of the conveyance, when he was unadvised as to the financial condition of the grantor, is stretching the doctrine of constructive notice to the point at which it ought to and must break. The consideration put into deeds can not, in this country, be taken as an evidence of the actual price paid. * * * If we should hold that a creditor who is without right to file a bill, because he is a general creditor and not one by judgment, is bound to take notice of recorded deeds, and of *the expressed consideration, and therefore conclude that the conveyance is voluntary*, it would be carrying the doctrine of constructive notice to an extent unwarranted by precedent," etc.

It will be observed, from these excerpts, that neither the Supreme Court of Colorado, nor the Court of Appeals of that state, was called upon to decide, or intended to intimate, that a *simple* creditor was not chargeable with constructive notice of the character of title appearing of record, which his debtor was clothed with to realty, in his possession at the time of the incurring of the indebtedness.

Indeed, to hold that a simple creditor is not chargeable with such notice would be, in effect, to declare that the recording statutes are worse than useless—"a delusion and a snare." It would mean that where a mortgagor, in possession of realty, has duly executed, acknowledged and deliv-

ered a mortgage thereof, and the mortgagee duly causes such mortgage to be placed of record, persons thereafter extending credit to the mortgagor in possession are not chargeable with constructive notice of the recorded mortgage.

Such, we submit, is not the law, in any state of the Union, and is directly contrary to the express holding of this court, in Wiser vs. Lawler, *supra*.

The motion to file the amended bill was properly refused upon another ground. The final decree had been rendered and entered over a month before the tender of such amended bill, and in the motion for leave to file such bill no application was made to vacate the final decree. (Transcript, pages 44-48.)

The trial court could not properly permit the filing of an amended bill in a suit that had been previously dismissed by a final decree, while such final decree stood unvacated and in force. A motion to vacate the decree, therefore, should have preceded or accompanied the application to amend, and such motion not having been made, the court was without power to permit the filing of the amendment.

Many other reasons might be suggested why the action of the trial court was entirely proper in declining to allow the amended bill to be filed, but the foregoing we deem to be sufficient.

We, therefore, respectfully submit the cause to the judgment of this court, confidently believing that a judgment of affirmance is not only justified, but required.

Respectfully submitted,

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